Republican
National
Committee

Thomas J. Josefiak
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February 26, 1999

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Federal Elections Commission
999 E Street, NW
Washington, D.C. 20463

Dear Mr. Noble:

Enclosed are three copies of the Brief of the Republican National Committee in Response to the General Counsel's Brief in MUR 4250. The original and ten copies were filed with the Secretary of the Federal Election Commission.

Sincerely,

Thomas J. Josefiak

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Sincerely,

Thomas J. Josefiak, Esq.

BEFORE THE FEDERAL ELECTION COMMISSION

In The Matter Of	)	
Republican National Committee and	)	MUR 4250
Alex Poitevint, as treasurer	)	

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE IN RESPONSE TO THE GENERAL COUNSEL'S BRIEF

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BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE
IN RESPONSE TO THE GENERAL COUNSEL'S BRIEF

This brief is submitted by the Republican National Committee (the "RNC") in response to the General Counsel's Brief in support of his recommendation that the Federal Election Commission (the "Commission") find probable cause to believe that the RNC knowingly and willfully violated 2 U.S.C. §441e "by accepting approximately one million six hundred thousand dollars in loan proceeds secured with foreign national funds." General Counsel's Brief at 1. Based on the objective, indisputable facts, the recommendation of the General Counsel is contrary to the law. Accordingly, the Commission should not approve the recommendation, should find that there is no probable cause to believe that the RNC violated §441e, and should close the file.

I. SUMMARY OF ARGUMENT.

Section 441e makes it unlawful to make, solicit, accept or receive certain "contributions" from foreign nationals:

> It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for political office; or for any person to solicit, accept, or receive any such contribution from a foreign national.

2 U.S.C. §441e (emphasis added). There are three independent reasons why the RNC's acceptance of the $1,600,000 in loan repayments from the National Policy Forum ("NPF") did not violate §441e. Each of these reasons provides a sufficient ground in and of itself for the Commission to reject the General Counsel's recommendation.

First, the repayment of a pre-existing, bona fide loan is not a "contribution" where, as here, the borrower is paying a commercially reasonable interest rate. Rather, the repayment of a bona fide, preexisting loan is a commercial transaction. The General Counsel has not identified any authority that supports his position that a repayment of a bona fide loan can constitute a "contribution" within the meaning of FECA. Where, as here, the repayment is made pursuant to a commercially reasonable interest rate and the repayment is made to an entity that is not a political committee and therefore is outside the FEC's jurisdiction.

Second, it is undisputed that NPF, not any foreign national, made the loan repayment to RNSEC. The General Counsel has not, and cannot, identify any authority for treating the loan repayment as having been made by Young Brothers Development, Ltd. (USA) ("YBD-USA"), let alone by Young Brothers Development Ltd. (Hong Kong) ("YBD-Hong Kong") or by Ambrous Young.

Third, the $1,600,000 loan repayment was paid into the Republican National State Elections Committee ("RNSEC"), the non-federal, soft money account of the RNC. Even if the $1,600,000 loan repayment by NPF to RNSEC were a donation (and, as set forth below, it is not), it would not be a "contribution" within the meaning of FECA. FECA limits the term, "contribution," to hard money. As set forth above, RNSEC is a non-federal, soft money account. Donations to RNSEC therefore are not "contributions" within the meaning of FECA.

Moreover, neither NPF nor Signet Bank was a political committee. Therefore, neither the Signet Loan to NPF nor the pledge of collateral as security for the loan was a contribution within the meaning of FECA.

In addition, the evidence establishes that the RNC did not believe its conduct violated §441e. Accordingly, there is no basis for a finding that the RNC acted knowingly and willfully.

II. STATEMENT OF THE FACTS.

A. Republican National Committee.

The current RNC is an unincorporated association created by the Rules of the Republican Party adopted on August 12, 1996, by the Republican National Convention in San Diego, California. Millions of Americans contribute to the RNC every year. Between 1993 and 1998, the RNC received 9.4 million donations with an average donation of $46.06.

The RNC places great emphasis on fully complying with federal election laws. The RNC's outstanding disclosure record illustrates the RNC's emphasis on election-law compliance. FECA requires political committees to itemize and disclose information regarding all individual contributions to their federal account aggregating in excess of $200 in a calendar year. See 11 C.F.R. §104.7(b)(1). The RNC has historically achieved the best disclosure record of any major party committee in the United States.[1] Moreover, although not legally required, the RNC chooses to file FEC disclosure reports on a monthly basis. Most other party committees file disclosure reports bi-annually in odd-numbered years and quarterly in even-numbered years. The RNC's outstanding disclosure record demonstrates its compliance with the letter and spirit of the Act.

The RNC maintains aggressive internal controls to help ensure that it does not accept contributions from prohibited sources or in excessive amounts. For example, the RNC enters all individual contributions into a computer database to ensure that no individual inadvertently exceeds the annual $20,000 federal contribution limit to the RNC. Similarly, the RNC database flags all contributions received from contributors with a foreign zip code or drawn from a foreign bank

[1] During the 1994 and 1996 election cycles, the RNC disclosure rate for itemized contributions under the FEC best efforts regulations ranged from 84% to 91%. In contrast, the DNC achieved a disclosure rate of only 65% for the 1996 election cycle. See John E. Yang and Charles A. Babcock, "DNC Vows to Improve Reporting," The Washington Post, May 10, 1997 at A8.

account. All such contributions are thoroughly investigated to confirm that the contributor is not a foreign national.[2]

1. RNC Federal Account.

FEC regulations permit party committees which are involved in federal and non-federal election activity to choose between financing all of their operations through a federal account or through separate federal and non-federal accounts. See 11 C.F.R. §102.5. If a political committee chooses to finance its operations through a single federal account, all of its receipts and disbursements -- including those for non-federal election activity -- are subject to the prohibitions, limitations and reporting requirements of FECA. See 11 C.F.R. §102.5(a)(1)(ii). When a party committee chooses to establish separate federal and non-federal accounts, only the federal account is a "political committee" that is subject to FECA's prohibitions; the non-federal account is not a "political committee" within the meaning of FECA. See Campaign Guide for Political Party Committees at 4 (FEC 1996). ("The federal account alone is considered a political committee under federal law.") (emphasis in original).

The RNC has established separate federal and non-federal accounts to finance its operations. The RNC federal ("hard money") account is for federal election activity and is used to finance direct contributions to federal candidates, to make coordinated expenditures on behalf of federal candidates, and to pay for the federal share of joint federal/non-federal expenses such as administration and overhead costs. This federal account is a "political committee" within the meaning of FECA.

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[2] As this submission will show, the ban on foreign national contributions in 2 U.S.C. §441e does not extend to donations to non-federal accounts maintained by national party committees such as the RNC. Although such donations are legally permissible, the RNC has long had an internal policy of not accepting any donations from foreign sources.

2. Republican National State Elections Committee ("RNSEC").

RNSEC is the RNC's non-federal ("soft money") account. RNSEC finances the RNC's non-federal election activity at the state and local level throughout the United States. The Supreme Court has "recognize[d] that FECA permits unregulated 'soft money' contributions to a party for certain activities, such as electing candidates for state office, see §431(8)(A)(i) [statutory definition of contribution], or [the non-federal share of] voter registration and 'get out the vote' drives, see §431(8)(B)(xii) [exclusions from statutory definition of contribution]." Colorado Republican Federal Campaign Committee v. FEC, 116 S.Ct. 2309, 2316 (1996). RNSEC is also used to pay for the non-federal share of the RNC's joint federal/non-federal expenses such as overhead and administrative costs. Accordingly, the RNC, pursuant to FEC regulations, periodically transfers funds from RNSEC to the RNC's federal account to pay for the non-federal share of joint expenses. See 11 C.F.R. §106.5(g)(1)(i).

Payments to RNSEC are not contributions within the meaning of FECA. Indeed, the FEC recognizes this distinction by routinely referring to such payments as donations, instead of as contributions. See 11 C.F.R. 104.8(e); 11 C.F.R. 104.8(f); Instructions For Preparing the Aggregation Page Schedule I. Accordingly, individuals, corporations and labor unions may make unlimited donations to RNSEC. Donations to RNSEC and other non-federal accounts are commonly referred to as "soft money" or "non-federal" donations.

B. National Policy Forum.

NPF was formed in 1993 as a grass-roots, issue-oriented, non-profit organization dedicated to researching and addressing the major public policy issues facing the country.[3] It is not disputed

[3] The current members, officers and employees of the RNC have very little first-hand knowledge of any of the outside organizations involved in the Signet Loan to NPF. Where not otherwise noted, the RNC's factual discussion of outside organizations and individuals is based upon documents produced by the RNC, as well as upon information obtained from sources outside the RNC, such as public testimony before Congressional committees and publicly available news reports.

that NPF was incorporated under the laws of the District of Columbia, had its own board of directors and officers, set its own budget, and maintained its own bank and accounting records. The General Counsel does not allege that NPF was a political committee or that NPF made expenditures or contributions, or otherwise engaged in any electioneering activities.

C. Young Brothers Development-USA.

Based on publicly available information, the RNC presently understands that YBD-USA is a corporation chartered under the laws of Florida in 1991 and is wholly owned by a foreign company named YBD-Hong Kong. The RNC understands that while YBD-USA was formed in order to acquire a number of real estate properties in the United States and that, as of 1994, its assets were very limited.

Further, the RNC understands that the principal of YBD-Hong Kong, Ambrous Young, was a citizen of the United States until some time in approximately the first half of 1994, when he relinquished his United States citizenship. It is also the understanding of the RNC that Ambrous Young's wife and children remain United States citizens.

D. RNSEC Loans To NPF.

Between May 1993 and September 1994, RNSEC lent the NPF more than $2 million. All of RNSEC's loans to NPF were made pursuant to written loan agreements, duly recorded on the books and records of RNSEC, bore commercially reasonable interest rates and were disclosed in reports filed with the FEC, on Schedule I as non-federal disbursements.

During this period, NPF made partial loan repayments to RNSEC, consisting of $150,000 in October 1993 and $50,000 in December 1993. Neither of NPF's loan repayments was paid into the RNC's federal account. These loan repayments were duly recorded in the books and records of RNSEC and were disclosed in reports filed with the FEC, on Schedule I as non-federal receipts.

E. NPF-Signet Bank Loan Transaction.

Due to on-going fundraising difficulties, by August, 1994, NPF owed RNSEC more than $2.2 million. On October 13, 1994, NPF borrowed $2,100,000 from Signet Bank (the "Signet Loan"). The deposits of Signet Bank ("Signet"), a bank chartered under the laws of the Commonwealth of Virginia, are insured by the FDIC.

Signet made the loan to NPF in the ordinary course of business and in accordance with applicable banking laws and regulations. The Signet Loan was backed by certificates of deposit that YBD-USA pledged as collateral for the Signet Loan. Based on publicly available information, the RNC now understands that YBD-USA did not have sufficient assets at the time of the Signet Loan transaction to post the collateral, and that YBD-USA obtained funds from YBD-Hong Kong to purchase the certificates pledged as collateral. To be sure, in 1994, the source of the YBD-USA funds was not known to the Deputy Chief Counsel of the RNC, Thomas Josefiak, the then-Executive Director of the RNC, Scott Reed, or the chief financial officer of the RNC, Jay Banning. There is no evidence that neither YBD-Hong Kong nor Ambrous Young was ever discussed at any of the dozens of meetings of the RNC's senior staff.

On October 14, 1994, the NPF and Signet closed on the $2.1 million loan. Like most bank loan documents, the Credit and Security Agreement between NPF and Signet contained a section entitled "Use of Proceeds." The Use of Proceeds section specified that NPF expected to use almost $200,000 to pay accounts payable as of October 12, 1994, $1.6 million to make a partial repayment of the RNSEC debt, and the remainder to fund NPF's short-term working capital. Neither YBD-USA nor YBD-Hong Kong was a party to this Agreement; as the provider of the collateral, YBD-USA merely agreed and consented to the terms of the Credit and Security Agreement. Similarly, the RNC was not a party to the Loan Agreement, the RNC's only involvement in the transaction was to enter into a subordination agreement with Signet Bank.

The General Counsel Brief does not cite to any evidence showing that Ambrous Young or YBD-USA knew, let along designated, the extent to which NPF used the proceeds from the Signet Loan to partially repay the RNSEC debt. Indeed, Ambrous Young testified that he did not know the uses for which NPF sought the loan. Deposition of Ambrous Young at 30.

The RNC understands that all of the parties to the loan transaction -- NPF, YBD-USA and Signet -- had independent legal counsel review the transaction and confirm that it was legal and appropriate. Indeed, as the General Counsel acknowledges, E. Mark Braden of the national law firm of Baker & Hostetler provided a written opinion to NPF concluding that because the loan repayment would be made to an account that is not a "political committee" under FECA, the transaction would not conflict with any provision of or the Commission's regulations. The General Counsel concedes that the evidence "strongly suggests" that when Mr. Braden issued this opinion, he was aware of the foreign source of the funds that YBD-USA used to purchase the collateral. General Counsel's Brief at 21 n.19.

On October 20, 1994, NPF re-paid RNSEC $1.6 million of the approximately $2.2 million loan balance it then owed. It is the RNC's understanding that NPF used the remaining $500,000 from the Signet Loan to cover its internal operating costs. It is this October 20, 1994 loan repayment that the General Counsel alleges was a contribution by a foreign national in violation of §441e. General Counsel's Brief at 1.

After October 1994, NPF continued to experience fundraising difficulties and continued to obtain loans from RNSEC. Between October 20, 1994 and the end of 1996, RNSEC made additional loans to NPF totaling more than $1,700,000. At no point during the life of the NPF did the RNC advance to NPF funds from the federal account of the RNC.

III. THE RNC DID NOT VIOLATE §441e IN CONNECTION WITH THE NPF LOAN REPAYMENT.

A. The RNC Could Not Have Violated §441e By RNSEC's Accepting The NPF Loan Repayment Because A Loan Repayment Is Not A "Contribution."

As set forth in more detail infra at 14-33, the statutory and regulatory definition of contribution is limited to hard money. 2 U.S.C. §371(7), 11 C.F.R. 100.7. Accordingly, the General counsel must be taking the position that these definitions do not apply to §441e and that the term "contribution" should be construed so broadly as to include bona fide loan repayments.

Such an interpretation is contrary not only to FECA and to FEC regulations, but to the common understanding of the term. Commercial transactions at market terms are not considered contributions. Thus, the FEC has determined that the lease of computer equipment to a political committee was not a contribution for the purpose of FECA if the lease was consistent with current market practices and on the usual and normal terms. Advisory Opinion 1992-19 ("Goods or services provided at the usual and normal charge are not considered contributions."). Similarly, loan repayments are not commonly understood to be contributions. A homeowner who makes a mortgage payment does not view the payment as a contribution. Rather, the homeowner views the payment as a commercial transaction.

It is telling that the General Counsel has not cited any statutory provision in support of his position that the repayment of a bona fide loan constitutes a "contribution" within the meaning of §441e. See Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 387 (1976). The absence of any such statutory provision is fatal to the General Counsel's recommendation.

Under Buckley, FECA should be construed narrowly. In Buckley, the Supreme Court carefully scrutinized FECA to determine whether the challenged provisions were unconstitutionally vague. For example, when assessing the constitutionality of §608(e)(1), the Supreme Court stressed:

> Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests." The test is whether the language of §608(e)(1) affords the 'precision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms."

Buckley, 424 U.S. at 42, 96 S.Ct. at 645 (quoting NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340 (1963) (other citations omitted)).[4] The Supreme Court then assessed whether each of the key terms of §608(e)(1) was defined:

> The key operative language of the provision limits "any expenditure . . . relative to a clearly identified candidate. Although, "expenditure," "clearly identified," and "candidate" are defined in the Act, there is no definition clarifying what expenditures are "relative to" a candidate. The use of so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of §608(e)(1) make sufficiently explicit the range of expenditures covered by the limitation.

Buckley, 424 U.S. at 42, 96 S.Ct. at 645. In order to preserve §608(e)(1) against invalidation on vagueness grounds, the Supreme Court narrowly construed "relative to" to mean "in express terms advocat[ing] the election or defeat of a clearly identified candidate for federal office." Buckley, 424 U.S. at 44, 96 S.Ct. at 646-47. In light of this Supreme Court precedent, the FEC should not adopt an undelineated definition of "contribution" so broad that it would extend to commercial transactions such as loan repayments.

The recommendation of the General Counsel is especially inappropriate in that FEC regulations strongly suggest that a loan repayment cannot be a contribution. The FEC recognized the reality that a loan repayment is not a contribution when it promulgated a rule which expressly

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[4] In Button, the Supreme Court struck down a Virginia statute on the ground that it lacked the "precision" that "must be the touchstone in an area so closely touching our most precious freedoms." 371 U.S. at 438, 83 S.Ct. at 340. The Supreme Court stressed that "in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application" would not be tolerated. 371 U.S. at 433, 83 S.Ct. at 338. Therefore, if the FEC were to take the position that for the purpose of §441e the term "contribution" is so broad as to extend to partial repayments of pre-existing, bona fide loans previously made by a candidate, political committee or non-federal account, there is a substantial danger that the entire foreign national prohibition would be struck down as "susceptible of sweeping and improper application." Id.

provides that loan repayments to "political committees," such as the RNC federal account, are not contributions by the debtor where, as here, the charged interest rate does not exceed a commercially reasonable interest rate. 11 C.F.R. §100.7(a)(1)(i)(E) (providing that loan repayments to a political committee are not contributions and must be made with funds that are subject to the prohibitions of the Act). Although this regulation is not controlling here because the RNSEC account was a non-federal account, and therefore not a political committee, this regulation strongly supports the view that a partial repayment of a bona fide, pre-existing loan cannot be a "contribution" by the debtor within the meaning of FECA.[5] See also Advisory Opinion 1992-19, Internal Lease of Computer Equipment ("Goods and services provided at the usual and normal charge are not considered contributions.").

In short, a loan repayment of a pre-existing, bona fide debt is not a "contribution" within either the meaning of FECA or the common understanding of the term. This is the first, independent reason why the receipt by RNC of October 20, 1994 loan repayment to RNSEC cannot be considered the receipt of a "contribution" from a foreign national in violation of §441e.

B. The RNC Could Not Have Violated §441e By RNSEC's Accepting The NPF Loan Repayment Because NPF Was Not A Foreign National.

A second reason why the RNC did not violate §441e by accepting the $1,600,000 loan repayment is that the loan repayment was made by the NPF, and the NPF is not a foreign national within the meaning of FECA. Thus, even if the loan repayment could appropriately considered to be a "contribution," it would not be a contribution by a foreign national.

The General Counsel attempts to overcome this undisputed fact by relying on 11 C.F.R. §100.7(a)(1)(i) and 11 CFR §100.7(a)(1)(i)(C). General Counsel's Brief at 4-5. This reliance is

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[5] It would surely be incongruous for the Commission to conclude that a loan repayment is a contribution if made to a "soft money" account, but not if made to a "hard money" account.

misplaced. First, these provisions merely provide that a loan, a guaranty, an endorsement, and any other form of security can, under certain circumstances, be a "contribution" within the meaning of §431(8). The provisions do not provide that every loan and every pledge of collateral is a "contribution" within the meaning of §431(8). For example, when ordinary Joe Citizen pledges his home as security in order to obtain a second mortgage with which to send his daughter to college, Joe Citizen is not making a contribution merely because the pledge of his home as collateral is a "form of security." As set forth infra, an essential factor in determining whether a loan or the pledge of security in support of a loan is a contribution is whether the borrower is a "political committee" or federal candidate. NPF was neither.

Moreover, the $1.6 million wire transfer from NPF to RNSEC was neither a loan nor a form of security; it was a loan repayment. The General Counsel offers no explanation as to why regulations relating to loans or any form of security are relevant to whether a loan repayment is a contribution. As set forth above, a loan repayment is not a contribution for the purpose of FECA.

In the Factual and Legal Analysis relating to the Commission's finding that there was reason to believe that the RNC had violated §441e by accepting the NPF loan repayment, the General Counsel noted that the DNC had alleged that "the RNC violated the foreign national prohibition by accepting loan proceeds secured by foreign national funds as part of a deliberate program of soliciting foreign national funds for the RNC through the NPF." However, as the General Counsel implicitly acknowledges in his probable cause brief, this was inaccurate; the $2.1 million in proceeds from the Signet Loan were paid to NPF, which then made a $1.6 repayment to the RNC's non-federal, soft money account, RNSEC, of the bona fide loans previously extended by RNSEC to

NPF. General Counsel's Brief at 2. There is no basis under FECA for treating the Signet loan to NPF as a loan to RNSEC.[6]

The Signet Loan documents clearly show that the borrower was NPF. NPF, not RNSEC or the RNC, signed the promissory note to Signet. NPF, not RNSEC or the RNC, signed the other basic loan document, the Credit and Security Agreement between NPF and Signet Bank. The only loan document that the RNC signed was a Subordination Agreement that the RNC signed so that the NPF debt to the RNC could be subordinated to the $2.1 million loan from Signet.

It appears from the loan documents identified by the General Counsel that NPF obtained substantial benefits from the Signet loan. In addition to paying down the loan balance owed to RNSEC, NPF was able to use the loan proceeds to pay almost $200,000 in accounts payable as of October 12, 1994, and still have more than $300,000 remaining to provide short-term working capital for NPF.

Because NPF was not a foreign national within the meaning of FECA, the RNC did not violate, and could not have violated, §441e by accepting the $1,600,000 NPF loan repayment.

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[6] The General Counsel's Brief makes numerous efforts to portray the RNC and NPF as having a "very close relationship." General Counsel's Brief at 5. For example, the General Counsel quotes from a draft memorandum prepared by the RNC which states that ""[t]he RNC is creating the national Policy Forum (NPF) as an issue development subsidiary," General Counsel's Brief at 6, but fails to notify the Commission that this language was deleted from the final version of the memorandum signed by Haley Barbour. RJ029350. General Counsel's Brief at 5. However, it does not appear that the General Counsel attaches any legal significance to this portrayal. The extent to which there was a relationship between the RNC and NPF is not relevant to whether RNSEC's acceptance of the loan repayment violated §441e.

Section 441e can only be violated if there were a contribution by a foreign national. NPF was set up as an independent non-profit corporation. Regardless of the extent of any relationship between the RNC and NPF, neither RNSEC nor NPF was a candidate or political committee under the Act. Accordingly, neither the loan repayment nor the pledge of collateral as security for the Signet Loan to NPF can be considered a "contribution" within the meaning of FECA.

C. The RNC Could Not Have Violated §441e By Accepting The NPF Loan Repayment Because A Donation To RNSEC Is Not A "Contribution" Within The Meaning Of FECA.

As set forth above, the NPF loan repayment to RNSEC could not have been a contribution by a foreign national in violation of §441e because loan repayments are not contributions and because NPF was not a foreign national. A third independent reason why the RNC did not violate §441e by RNSEC's accepting the $1,600,000 loan repayment is that donations to soft money accounts are not "contributions" within the meaning of FECA. Accordingly, even if the loan repayment were viewed as a donation to RNSEC (and as set forth infra at 9, it should be viewed as a commercial transaction, not as a donation), the transaction did not violate §441e. Although foreign national donations to party committee non-federal accounts are legally permissible, the RNC, as noted previously, has always had a policy not to knowingly accept any foreign national money into any of its accounts. The RNC has no intention of changing that policy.

1. The U.S. District Court for the District of Columbia has held that §441e as a matter of law does not extend to donations to soft money accounts.

The only court to consider the issue has held that when used in FECA, the term "contribution" does not include political donations to soft money accounts. United States v. Trie, 23 F.Supp.2d 55 (D.D.C. 1998). In Trie, the government had charged Mr. Trie with, among other things, a conspiracy in violation of 18 U.S.C. §371 to impair and impede lawful functions of the FEC. In considering this charge, Judge Friedman rejected the Government's contentions that FECA's prohibition of contributions by foreign nationals under 2 U.S.C. §441e applies to soft money donations as well as to hard money contributions:

> With one exception, 2 U.S.C. §441b, which has its own separate definition of the term, "contribution," the word "contribution" has been defined by Congress in FECA as "money or anything of value made by any person for the purpose of influencing any election for *Federal* office." 2 U.S.C. § 431(8)(A) (emphasis added). That is the definition (with one exception already noted) that governs throughout the statute. Because 2 U.S.C. § 441e specifically prohibits only

contributions by foreign nationals, the statute on its face therefore does not proscribe soft money donations by foreign nationals or by anyone else.

The Government argues that because Section 441e uses the phrase "an election to any political office" (emphasis added), Congress necessarily intended for Section 441e to apply to soft money donations. Government's Opposition at 18. In making this argument the Government omits the essential language that describes the conduct that the statute prohibits making a contribution of money or other thing of value in connection with an election to any political office. The word *contribution* is a term of art defined by the statute, and the statutory definition applies only to elections for *federal office*, see 2 U.S.C. §431(a)(8); it does not encompass soft money donations. If Congress had intended Section 441e or any other provision of FECA to apply to soft money, it either could have provided an alternative definition of the term "contribution" for Section 441e, as it did for Section 441b, or it could have used the word "donation" rather than "contribution," as the regulations promulgated by the FEC do when referring to "non-federal" or "soft money" accounts. [citations omitted] Congress did neither in Section 441e.

In the face of the clear statutory language and in the absence of any indication in the statute or legislative history that Congress intended Section 441e to apply to soft money donations, the Court concludes that Section 441e applies only to hard money "contributions." Indeed, it could not be more apparent that, with the exception of Section 441b, Congress intended the proscriptions of the Federal Election Campaign Act to apply only to "hard money" contributions.[fn/]

[fn/] It is worth noting that the Bipartisan Campaign Reform Act of 1998, a bill introduced in the House of Representatives on March 19, 1998, to amend the Federal Election Campaign Act, contains a section entitled "Strengthening Foreign Money Ban" that would amend Section 441e to specifically prohibit foreign nationals from making "a *donation* of money or other thing of value." Bipartisan Campaign Reform Act of 1998, H.R. 3526, 105th Cong. §506 (1998) (emphasis added).

The proposed amendment suggests that the House of Representatives does not believe that Section 441e as currently drafted prohibits foreign nationals from making donations of soft money. While the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, ___, 118 S.Ct. 789, 803, 139 L.Ed.2d 773 (1998), quoting United States v. Philadelphia National Bank, 374 U.S. 321, 348-49, 83 S.Ct. 1715, 10 L.Ed.2d 915 91963), the proposed amendment to Section 441e further undermines the government's argument. Cf. Loving v. United States, 517 U.S. 748, 770, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) ("subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction") (internal quotations omitted);

Beverly Community Hospital Assn. V. Belshe, 132 F.3d 1259, 1265 (9th Cir. 1997) (same).

Id. at 60 (emphasis in original). The Commission should give great deference to this carefully reasoned holding, which was reached in a high-profile case after briefing by the Department of Justice Campaign Finance Task Force.[7]

a. Under the plain language of FECA, "contribution" does not include donations to soft money accounts.

As Judge Friedman stated, the statutory language is clear. Under the plain language of FECA, the term "contribution" does not include soft money donations. As the Supreme Court has noted, "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S. Ct. 3245, 3250 (1982) (quoting United States v. American Trucking Associations, Inc., 310 U.S. 534, 543, 60 S. Ct. 1059, 1063 (1940)).

FECA provides that "[w]hen used in this Act" the term, "contribution" means "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. §431(8)(A) (emphasis added). The definition section of FECA applies to the entire Act. 2 U.S.C. §431(8). No provision of FECA

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[7] Attorney General Reno recently provided a similar explanation to the U.S. Court of Appeals for the D.C. Circuit as to why donations to soft money accounts are not "contributions" within the meaning of FECA. In the Gore Notification, the Attorney General focussed on the fact that donations to "soft money" accounts are not "contributions" within the meaning of FECA. Gore Notification at 29. In pertinent part, Attorney General Reno determined:

> The concept of hard as opposed to soft money in the context of federal election law is important to an understanding of this matter. The phrase "hard money" is a colloquial phrase commonly used to refer to "contributions" within the meaning of section 301(8) of the Federal Election Campaign Act (FECA) [2 U.S.C. §431(8)]. Section 301(8) of the FECA defines a "contribution" as "any gift . . . made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. §431(8)(A)(i). Because the term is defined in terms of an intent to influence a federal campaign, hard money is also often referred to as "federal" money, and the political parties maintain separate bank accounts, called federal and non-federal accounts, to keep the two kinds of donations separate . . . . "Soft money," in contrast, is commonly understood to refer to all other sorts of political donations to all sorts of political causes.

expands the statutory definition for the purpose of §441e. Indeed, the Commission has previously relied on the statutory definition of "contribution" in determining what activities are not covered by the foreign national prohibition. See Advisory Opinion 1987-25 (advising that uncompensated volunteer activity is not a contribution for the purpose of §441e).

The fact that Congress did not promulgate a special definition of the term "contribution" with respect to §441e is especially significant because Congress did promulgate special definitions of the term with respect to those statutory prohibitions that clearly ban donations made for the purpose of influencing elections to state, as well as Federal, office. With respect to the prohibition on contributions by national banks and corporations organized by the authority of any law of Congress, Congress enacted a definition of "contribution" that is not limited to elections for Federal office. See 2 U.S.C. §441b(b)(2). Similarly, with respect to the prohibition on contributions by public utility holding companies, Congress enacted a definition of the "contribution" that is not limited to Federal elections. See 15 U.S.C. §79*l*(h) (setting forth a definition of contribution not limited to federal elections after expressly referring to "any contribution whatsoever in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing.").

The definition of "contribution" set forth in 2 U.S.C. §431(8) is controlling and unambiguous. As demonstrated in the context of contributions by national banks, corporations organized under a law of Congress, and public utility holding companies, Congress knew how to draft a definition of contribution that was not limited to elections for Federal office. Thus, it is clear

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Gore Notification at 4-5 (emphasis in original).

from the statute that for the purpose of §441e, the term, "contribution" does not include soft money donations.

b. Principles of federalism further support the conclusion that "contribution" does not include donations for the purpose of influencing non-federal elections.

Under well-established Supreme Court case law, a statute cannot be construed as regulating state and local elections unless it is unmistakably clear on the face of the statute that Congress intended to regulate state and local elections. The Supreme Court has stressed that state and local elections are an area traditionally regulated by the states:

> Just as "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," . . . "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen."

Gregory v. Ashcroft, 501 U.S. 452, 461-462, 111 S. Ct. 2395, 2401 (1991) (citations omitted). In Gregory, the Supreme Court stated that a federal statute shall not be construed as interfering with the sovereign affairs of the states unless Congress has made this unmistakably clear on the face of the statute:

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."

Gregory, 501 U.S. at 460, 111 S. Ct. at 2401 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S. Ct. 3142, 3147 (1985)). See also United States v. Bass, 404 U.S. 336, 92 S. Ct. 515 (1971).

With respect to this matter, §441e does not constitute an "unmistakably clear" statement that the Congress sought to regulate state and local elections by prohibiting foreign nationals from making contributions in connection with such elections. The absence of such an "unmistakably clear" statement is dispositive.

c. The General Counsel's reliance on the legislative history of §441e is misplaced.

In arguing that the FEC should find probable cause to believe that the RNC violated §441e by accepting the $1,600,000 NPF loan repayment, the General Counsel suggests that the Commission should disregard the holding of Trie in part because the opinion failed to consider "the legislative history establishing the provision's broad scope . . . ." General Counsel's Brief at 3 n.2.[8] There is no merit to this argument.

First, Judge Friedman was aware of the legislative history of §441e when he decided Trie. The briefs filed by Trie addressed the legislative history of §441e. See, e.g., Memorandum Of Law In Support Of Defendant Yah Lin Trie's Motion To Dismiss Count 1 For Failure To State An Offense Under 18 U.S.C. §371 And Violation Of Due Process ("Trie's Brief") at 12.[9] Indeed, Judge Friedman's opinion expressly addressed the legislative history of the provision, Trie, 23 F.Supp.2d at 60 (noting "the absence of any indication . . . in the legislative history that Congress intended Section 441e to apply to soft money donations").

Second, in that the prohibition of §441e is clearly limited to "contributions" as that term is defined in §431(8), the legislative history is irrelevant. "Legislative history is irrelevant to the interpretation of an unambiguous statute." Davis v. Michigan Department of Treasury, 489 U.S. 803, 808, 109 S.Ct. 1500, 1504 (1989).

Third, contrary to the General Counsel's assertion, the legislative history of the foreign national prohibition strongly indicates that §441e should be interpreted as only prohibiting political contributions for the purpose of influencing federal elections and as not prohibiting political donations for the purpose of influencing state and local elections. Section 441e has its roots in §613

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8 It should be noted, however, the General Counsel does not state that Trie was wrongly decided.

9 A copy of Trie's Brief is attached as Exhibit A.

of the Foreign Agents Registration Act ("FARA"), which was added to FARA by amendment in 1966. The object and policy of FARA was to protect the Federal Government, not state and local governments, from foreign influences:

> It is hereby declared to be the policy and purpose of this Act to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities on behalf of foreign governments, foreign political parties, and other foreign principals so that *the Government* and the people of the United States may be informed of such person and may appraise their statements and actions in light of their association and activities.

S. Rep. No. 913, at 1 (1941) (emphasis added).[10] Beyond the actual language of FARA's provisions, the legislative history of FARA also indicates, through repeated reference to foreign influence on the policies and officials of the Federal Government,[11] coupled with the lack of reference to foreign influence on state or local governments, that FARA only focused on and applied to the Federal Government.

Furthermore, in 1974, Congressman Frenzel, the Republican Floor Manager for the 1974 Amendments to FECA and a leading Congressional expert on campaign finance, expressly noted that the FECA definition of "contribution" was being incorporated into the prohibition against contributions by foreign nationals. In a personal supplemental report that he appended to the House Report on the 1974 amendments to FECA, Congressman Frenzel expressed concern that the FECA definition of "contribution" contained loopholes such as exclusions for the use of real or personal property or the sale to a candidate of food or beverage at a discounted price if their value did not

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[10] If FARA had been directed at protecting state and local governments as well as the Federal Government, the passage quoted above would have expressly referred to state and local governments, instead of only to "the Government."

[11] See e.g., S. Rep. No. 143 at 2 (noting that foreign agents no longer seeks to overthrow or subvert the U.S. Government, but seek to influence the policies of the U.S. Government through the lawyer-lobbyist).

exceed $500.00 and that these loopholes would permit foreign nationals to circumvent the foreign national prohibition. H.R. Rep. No. 93-1239 at 153 (1974).[12]

Congressman Frenzel's concern is significant for two reasons. First, it shows that Congress focused on the fact that the FECA definition of contribution was being incorporated into §441e. If Congress had intended to include soft money donations under §441e, Congress therefore would have added to the definitions subsection of §441e a special definition of contribution similar to the special definitions enacted with respect to national banks, corporations organized under authority of a law of Congress, and public utility holding companies. Second, while Congressman Frenzel specifically addressed the application of the statutory definition of "contribution" to the foreign national prohibition, he did not express any concern that the statutory definition was limited to federal contributions.

There is no merit to the General Counsel's assertion that broad, general language in the legislative history evidences an intention by Congress that the prohibition apply to political donations in connection with state elections. The fallacy in the Government's interpretation is illustrated by the FEC's interpretation of similarly broad language in 2 U.S.C. §441c, which prohibits government contractors from "directly or indirectly [making] any contribution of money or other things of value . . . to any political party, committee, or candidate for public office or to any person for any political purpose or use." Construing 18 U.S.C. §611, which was the predecessor to §441c, the FEC concluded that, despite the breadth of the statutory language, the prohibition "was intended to apply to Federal elections only." FEC Advisory Opinion 1975-99. See also 11 C.F.R. §115.2. The FEC reasoned that "[i]f Congress intended that §611 apply to State and local elections

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[12] The Commission has previously relied on this statement by Congressman Frenzel in issuing an advisory opinion advising a foreign national student that his work as a volunteer would not be considered a contribution for the purpose of §441e. See Advisory Opinion 1987-25. In addition, Judge Friedman was aware of this statement when he ruled in Trie that §441e did not extend to soft money donations. [cite]

after the 1971 Act, it would seem logical that there would be some specific language or legislative history to this effect" and concluded:

> the most reasonable construction of the language of Section 611 prohibiting contributions to any political party, committee or candidate . . . or to any person for any political purpose or use is that it was meant to be a catchall clause applying to any gift of money which affects the Federal election process, irrespective of whether such gift is to a specified political party, committee or candidate.

FEC Advisory Opinion 1975-99. Given that the FEC found that specific statutory language referring to "any political purpose or use" was limited to "the Federal election process," there is no basis for the General Counsel's claim here that the equivalent language in the legislative history of §441e and its predecessor indicates a broader Congressional intent.

The legislative history of §441e contains no evidence that Congress considered whether it was appropriate for Congress to regulate the financing of state and local elections. This is highly significant. United States v. Bass, 404 U.S. 336, 92 S. Ct. 515 (1971). In Bass, the Supreme Court adopted an interpretation of an ambiguous criminal statute regarding the illegal possession of firearms that did not significantly change the federal-state balance because the legislative history did not address the impact of the statute on the federal-state balance:

> In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. In Rewis, we declined to accept an expansive interpretation of the Travel Act. To do so, we said then, "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." While we noted there that "[i]t is not for us to weigh the merits of these factors," we went on to conclude that "the fact that they are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that [the statute have the broad reach]."

United States v. Bass, 404 U.S. at 349-50, 92 S. Ct. at 523.[13]

[13] The General Counsel does not identify in his Brief any statements in the legislative history on which he

In short, the legislative history supports the holding in Trie that §441e does not extend to soft money donations. The legislative history strongly indicates that Congress was focused on elections to Federal office. These indications are corroborated by the absence of any legislative history indicating that Congress considered whether it would be appropriate to regulate state elections with respect to this issue.

d. The General Counsel's reliance on prior Commission practice is misplaced.

The General Counsel also argues that the Commission should disregard Trie because Judge Friedman did not expressly consider the FEC's "consistent application of the prohibition to non-federal elections." General Counsel's Brief at 3 n. 2. Judge Friedman was aware of the Commission's practice when he decided Trie. See Trie's Brief at 14. In this section, the RNC explains why the FEC's prior "application of this prohibition to non-federal elections" does not warrant continued application of an interpretation that is contrary to the plain language of the statute and is not supported by the traditional tools of statutory construction.

First, the statutory definition of "contribution" is unambiguous and controlling. "If the statute is clear and unambiguous, 'that is the end of the matter for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Atlanta College of Medical and Dental Careers, Inc. v. Riley, 987 F.2d 821, 827 (D.C. Cir. 1993) (quoting Board of Governors of the Federal Reserve System v. Dimension Financial Corp. 474 U.S. 361, 368, 106 S.Ct. 681, 685

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purports to rely. This is not surprising; he does not want to provide the RNC with an opportunity to address any excerpts that he includes in his Reply Brief. There is no Committee report expressly stating that the prohibition was intended to cover political donations intended to influence state, as well as federal, elections. Presumably, the General Counsel's Reply Brief will cite vague statements in the legislative history that "contributions by foreigners are wrong, and they have no place in the American political system." and "I do not think foreign nationals have any business in our political campaigns." Remarks of Senator Bentsen, 120 Cong. Rec. 8782, 8783 (1974). Reliance on such citations is inappropriate. First, Senator Bentsen's references to the Watergate scandals strongly suggests that he was focussing on federal elections. Second, if Senator Bentsen had intended his broad comments to apply to the state, as well as the federal government, he presumably would have urged that the foreign national prohibition extend to referenda, as well as to elections for political office. Thus, taken as a whole, Senator Bentsen's remarks reflect a focus on federal elections.

(1986) (quoting Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781 (1984))) (declining to defer to agency interpretation). See also FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981) (courts "must reject administrative constructions of the statute, whether reached by adjudication or rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.") (citing SEC v. Sloan, 436 U.S. 103, 118 (1978) (rejecting long-standing SEC interpretation of the Securities Exchange Act of 1934).

This approach is illustrated by Orloski v. FEC, 795 F.2d 156 (D.C.Cir. 1986). In Orloski, the issue was whether the subjective intent of a donor is relevant to determining if a transaction is a "contribution" within the meaning of FECA. The FEC interpreted FECA as not requiring an inquiry into the state of mind of the donor. The Court of Appeals determined that the FEC interpretation did not conflict with "the express language of the Act." 795 F.2d at 162. Next, the Court of Appeals determined that legislative history did not foreclose the FEC's interpretation. Id. at 163. Only after answering both of these inquiries in the negative did the Court of Appeals consider the extent to which it should defer to the particular FEC interpretation at issue in that case.

Second, the District Court in Trie was correct in not deferring to the prior FEC practice regarding the scope of §441e because a statute regulating the financing of state and local elections alters "the usual constitutional balance between the States and the Federal Government." Gregory, 501 U.S. at 460-61, 111 S. Ct. at 2401. In Gregory the Supreme Court gave no deference to an EEOC interpretation of a statute on the ground that courts will not construe a federal statute to alter the "usual balance between the States and the Federal Government [unless Congress makes] its intention to do so 'unmistakably clear in the language of the statute.'" Id. Cf. Chamber of Commerce v. FEC, 69 F.3d 600, 605 (D.C. Cir. 1995) (FEC interpretation of FECA not entitled to

deference where interpretation posed serious difficulties related to constitutional liberties); DeBartolo Corp. v. Florida Gulf Coast Building, 485 U.S. 568, 577-78 (1988) (in area of constitutional sensitivity, an agency's interpretation will be rejected unless there is the "clearest indication in the legislative history" supporting it). Similarly, even if §441e were ambiguous, and it is not, the Supreme Court would not defer to an FEC interpretation that would alter the balance between the State and the Federal Government by regulating the financing of state and local elections.

Third, the District Court was correct in not deferring to prior FEC practice regarding §441e because "the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's [interpretation]." DSSC, 454 U.S. at 37; Orloski, 795 F.2d at 164 (the thoroughness, validity and consistency of the FEC's reasoning are among the factors that courts consider in deciding whether to defer to an FEC interpretation of FECA). The reasoning behind FEC's prior practice regarding §441e is inconsistent with regulations promulgated by the FEC and with the reasoning that the FEC has applied in interpreting other provisions of FECA. In addition the reasoning behind the FEC's prior practice is invalid.

The FEC's prior practice is inconsistent with the regulation that the FEC submitted to Congress that defines "contribution" with respect to elections for Federal office, "A gift, subscription, loan . . . advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office is a contribution." 11 CFR §100.7. This regulation did not exempt §441e from its scope. Moreover, the FEC has not promulgated any regulation setting forth a special definition of contribution for the purpose of §441e. The failure of the FEC to attempt to promulgate a special definition of contribution for the purpose of §441e is especially significant since the FEC did include in Part 114 (the regulations relating to corporate and

labor organization activity) a special regulation that did not contain the "election for Federal office" limitation and did expressly extend this broader definition to prohibitions relating to public utility companies. 11 CFR §114.1(a)(1). The FEC regulation defining "contribution" and the failure of the FEC either to provide an equivalent regulation in 11 CFR §110.4 or to extend the definition in §114 to §110.4 are both powerful factors supporting Judge Friedman's position that §441e does not extend to soft money donations. They also greatly undermine any deference which might otherwise have been given to the FEC's prior practice of extending §441e to state and local elections.[14]

Further, the reasoning behind the FEC's prior practice is invalid. The FEC articulated its reasoning in a 1987 advisory opinion in which it held that the exemptions set forth in the statutory definition of "contribution" applied to §441e:

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[14] The General Counsel attempts to overcome this obstacle by citing to 11 CFR §110.4(a)(3). Specifically, the General Counsel argues:

> The prohibition against foreign national contributions is further detailed in the Commissions Regulations at 11 CFR §110.4(a)(3). This provision states that a foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, with regard to such person's federal or non-federal election-related activities, such as decisions concerning the making of contributions or expenditures in connection with elections for any local, state, or federal office or decisions concerning the administration of a political committee.

To the extent that the General Counsel is arguing that §110.4(a)(3) provides a broader definition of the term "contribution" for the purpose of the foreign national prohibition, his argument is without merit. This regulation does not purport to define the term "contribution." To the extent that the General Counsel is attempting to suggest that the RNC violated this regulation even if it did not violate §441e, the suggestion should be rejected for at least two reasons. First, the regulation is limited to foreign nationals and does not purport to address the conduct of U.S. citizens or political committees. Second, §110.4 should be interpreted as limited to the issue of when a contribution or expenditure by a domestic subsidiary of a foreign parent should be deemed to be a prohibited contribution by the foreign parent. This regulation has repeatedly been referred to as codifying the advisory opinions addressing when contributions by a domestic subsidiary of a foreign parent would be deemed to be a prohibited contribution by the foreign parent. To extend this regulation beyond this issue would raise serious doubts as to its constitutionality.

The General Counsel was correct in not citing to 11 CFR §110.4(a)(1) in support of his recommendation. Like §441e, §110.4(a)(1) does not extend to soft money donations and does not purport to define the term "contribution." This regulation therefore does not shed light on the definition of "contribution" for the purpose of §441e. Rather, it prohibits foreign nationals from making contributions or expenditures in connection with an election for federal or state office. Thus, under this regulation, a foreign national is prohibited from making a contribution to the federal account of a national political party pursuant to 11 C.F.R. §102.5a(1)(ii) regardless of whether the federal account is used in connection with federal election activity or is used in connection with state and local elections.

> In the 1976 amendments to the [Federal Election Campaign] Act . . . Congress repealed 18 U.S.C. § 613 and reenacted the foreign national prohibition [in the FECA]. In doing so, Congress provided that the prohibition was governed by the definitions, and their exemptions in 2 U.S.C. § 431 . . . . In contrast, the prohibition has always been applicable in connection with any election whether Federal, state, or local. See 11 CFR 110.4(a)(1). Thus, by repealing and reenacting the foreign national prohibition as part of the Act in 1976, and by amending the definitions which govern interpretation of the term 'contribution' as used in the Act, Congress has limited the scope of the foreign national prohibition as to the meaning of the term "contribution," while retaining the aspect of the prohibition that extends to all elections.

FEC Advisory Opinion 1987-25, at 1. Thus, the FEC acknowledged that Congress provided that the foreign national prohibition "was governed by the definitions, and their exemptions in [FECA]" and implicitly conceded that the definition of "contribution" does not include donations made for the purpose of influencing non-federal elections. This acknowledgement would appear to require the conclusion that §441e does not regulate the financing of non-federal elections. The FEC nevertheless attempted to escape this conclusion by making two unsupported, illogical assertions. First, the FEC asserted that the foreign national prohibition in FARA had applied to donations for the purpose of influencing non-federal elections. However, the FEC regulation that Advisory Opinion 1987-25 cited to support this assertion was not promulgated until after the 1976 amendments and does not refer to FARA. Second, the FEC contended that by amending the statutory definition of "contribution" as used in FECA, Congress somehow retained the aspect of the prohibition that extends to all elections. However, the FEC did not -- and could not -- identify any amendment to the statutory definition of "contribution" indicating that for the purpose of §441e the definition includes donations for the purpose of influencing non-federal elections.[15]

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[15] The invalidity of the FEC's reasoning has resulted in the Commission taking inconsistent positions on whether §441e extends to volunteer committee work. In Advisory Opinion 1981-51, the Commission determined that the foreign national ban did extend to volunteer activity. As set forth above, in Advisory Opinion 1987-25, the Commission determined that §441e did not extend to volunteer activity.

The reasoning of the FEC with respect to §441e is also inconsistent with the position taken by the FEC with respect to §441c, which prohibits government contractors from "directly or indirectly [making] any contribution of money or other things of value . . . to any political party, committee, or candidate for public office or to any person for any political purpose or use." Construing 18 U.S.C. §611, which was the predecessor to 2 U.S.C. §441c, the FEC concluded that, despite the apparent breadth of the statutory language, the prohibition "was intended to apply to Federal elections only." FEC Advisory Opinion 1975-99. See also 11 C.F.R. §115.2. As noted above, the FEC reasoned that "[i]f Congress intended that §611 apply to State and local elections after the 1971 Act, it would seem logical that there would be some specific language or legislative history to this effect" and concluded:

> the most reasonable construction of the language of Section 611 prohibiting contributions to any political party, committee or candidate . . . or to any person for any political purpose or use is that it was meant to be a catchall clause applying to any gift of money which affects the Federal election process, irrespective of whether such gift is to a specified political party, committee or candidate.

FEC Advisory Opinion 1975-99, quoting 2A J. Sutherland, Statutes and Statutory Construction §47.17. There is no specific statutory language or legislative history that §441e should be extended to political donations for the purpose of influencing state and local elections. Accordingly, the reasoning of the FEC with respect to §441e is inconsistent with the reasoning of the FEC with respect to the ban on "contributions" by government contractors.

For these reasons and the reasons set forth below, the District Court in Trie was correct in holding that, despite the FEC's prior application of §441e to state and local elections, §441e does not extend to soft money donations. In light of the District Court decision, the Commission should reevaluate the merits of the FEC's prior practice. As this brief demonstrates, the language of the statute, the principle of federalism, and the traditional tools of statutory analysis all demonstrate that

§441e does not extend to soft money donations. The Commission should not make a finding of probable cause that is contrary to a correct understanding of the law.

2. The fact that FECA regulates activity protected by the First Amendment militates against stretching the scope of the Act beyond its plain meaning.

The political activities regulated by FECA implicate core First Amendment rights:

> The contribution and expenditure limitations of FECA "operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

Buckley v. Valeo, 424 U.S. 1, 14, 94 S. Ct. 612, 632 (1976). As set forth infra at 37, the Supreme Court therefore stressed in Buckley that FECA should be construed very strictly because the Act regulates core First Amendment activity:

> Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct that he could not reasonably understand to be proscribed.' Where First Amendment rights are involved, an even 'greater degree of specificity' is required.

Buckley, 424 U.S. at 77, 96 S. Ct. at 662 (citations omitted) (emphasis added). Because FECA does not specify that §441e applies to soft money donations, it should not be extended to soft money donations.

3. Other traditional tools of statutory construction support the conclusion that §441e does not extend to donations made for the purpose of influencing non-federal elections.

Interpreting §441e as applying only to federal contributions is consistent with the rule of construction that "in expounding a statute, we . . . look to the provisions of the whole law, and to its object and policy." Massachusetts v. Morash, 490 U.S. 107, 115, 109 S. Ct. 1668, 1673 (1989) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51, 107 S. Ct. 1549, 1555 (1987)). As the

FEC explained in construing the prohibition on contributions by government contractors to apply only to federal contributions:

> [T]he plain intent and meaning of the amendments to 18 U.S.C. 591, 611 made by the Federal Election Campaign Act of 1971 and the 1974 Amendments thereto, is directed at Federal elections. If Congress intended that §611 apply to State and local elections after the 1971 Act, it would seem logical that there would be some specific language or legislative history to this effect. However, there is none.

FEC Advisory Opinion 1975-99 (emphasis added). Similarly, there is no specific language or legislative history to the effect that the prohibition on contributions by foreign nationals should be construed as applying to state and local elections.

The "'normal rule of statutory construction' is that 'identical words used in different parts of the same act are intended to have the same meaning.'" Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 570, 115 S. Ct. 1061, 1067 (1995). Gustafson involved the construction of the term "prospectus" as used in Section 12(2) of the Securities Act of 1933. The SEC submitted a brief *amicus curiae* in which it argued for a broad construction of the term in Section 12(2). Relying in large part on the normal rule that identical words in different parts of the same act are intended to have the same interpretation, the Supreme Court rejected the construction adopted by the SEC, even though the SEC was the agency that administers the Securities Act.

In short, Judge Friedman was correct in Trie when he held that a donation to a soft money account is not a "contribution" for the purpose of §441e. Thus, even if NPF's $1,600,000 loan repayment to RNSEC could be viewed as a donation, and it cannot be, as a matter of law, the foreign national prohibition in §441e does not extend to donations to soft money accounts.

4. The Subjective Intent Of Ambrous Young Is Not Relevant.

Moreover, as a matter of law the subjective intent of Ambrous Young is not relevant to determining whether the NPF loan repayment constituted a "contribution" for the purposes of

FECA. See, Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986). In Orloski, three corporations had donated food, drink and transportation to be provided to senior citizens attending a picnic co-sponsored by Congressman Don Ritter and a senior citizens committee shortly before the 1982 general election. Orloski argued that these corporate donations violated 2 U.S.C. §441b because they were made with the subjective motivation of helping Congressman Ritter win reelection. The FEC successfully argued that the subjective motivation of the corporate donors was irrelevant. The FEC explained that a focus on the actual motivation of the donor would subject the recipient to sanctions for accepting money that would be lawful but for the subjective beliefs of the donor:

> Mr. Orloski contends that the Commission is precluded from determining that a corporate donation to a noncampaign event is lawful if the officers of the corporation held a subjective belief that the donation might further a candidate's election changes. Such a subjective standard would not only be impossible to administer, but could subject the recipient of the donation to sanctions for accepting money which would be lawful but for the subjective beliefs of the contributor's officers. Nothing in the Act requires the Commission to choose the vague and shifting subjective test advocated by Mr. Orloski instead of the clear and easily applied objective criteria consistently utilized by the Commission. To the extent that Mr. Orloski's argument is that the corporate officers' reported mistaken initial impression that the picnic was a campaign event under the Act is binding on the Commission, the district court properly rejected it.

Brief of Appellee Federal Election Commission at 11 n. 9, Orloski v. Federal Election Commission, 85-5012 (D.C. Cir. Filed May 1, 1986) (emphasis added) (citations omitted). The Court of Appeals held that the objective test adopted by the FEC was consistent with the Act and might, in fact, be "implicitly mandate[d]" by the Act. 795 F.2d at 162.

Similarly, in determining that no independent counsel need be appointed in connection with certain telephone calls that Vice President Gore placed to individuals who made donations to the soft money account of the Democratic National Committee, Attorney General Reno addressed whether a donation to a soft money account could be converted into a "contribution" within the meaning of FECA based on the intent of the donor. Attorney General Reno correctly concluded

that the intent of the donor cannot convert a soft money donation into a contribution. Specifically, Attorney General Reno determined that a soft money donation was not converted into a contribution even though it was solicited by Vice President Gore while he was a candidate for reelection to the Office of Vice President, and the donor knew when he made the donation that the donation would be used to partially fund a media campaign that would support the reelection of President Clinton and Vice President Gore:

> This final solicitation was, again, a solicitation to support the media campaign. The fact that the donor was told several weeks earlier that the media campaign would also support the President's reelection adds nothing of substance. It is true that the ad campaign would support, in part, the President's reelection, but that fact is accounted for under the law by the fact that hard money must be used in part to pay for the advertisements. The fact that this reality had been previously brought to the donor's attention does not support an inference that a later general request from the Vice President for support for the media campaign was a request for hard rather soft money.

Notification to the Court Pursuant to 28 U.S.C. §592(b) of Results of Preliminary Investigations, In re Albert Gore, Jr. (the "Gore Notification") at 17-18 (emphasis added).

Indeed, any other determination would have had sweeping implications. As Attorney General Reno explained:

> The fact that legal soft money expenditures play a role in federal elections has been expressly acknowledged by the FEC. In one publication, the FEC pointed out that "most of the soft money spending that benefits federal candidates occurs when a committee simultaneously supports both federal and nonfederal candidates. Party committees, for example, may purchase generic get-out-the-vote advertisements that benefit both their federal and nonfederal candidates . . . . Federal Election Commission, The Presidential Public Funding Program 22 (1993) The FEC went on to acknowledge in the same publication that "[f]unds not subject to the federal election law ("soft money") may also play a role in Presidential elections." Id. at 30.

Gore Notification at 18. If the Attorney General had concluded otherwise and determined that a donation to a soft money account can be considered a contribution to a hard money account depending on the intent of the donor/contributor, she would have been creating type of "vague

and shifting subjective theory" that the FEC and the U.S. Court of Appeals for the D.C. Circuit rejected in Orloski. The Commission should likewise reject such an approach here.

D. The RNC Could Not Have Violated §441e By RNSEC's Accepting The NPF Loan Repayment Because The NPF Loan Repayment And The Signet Loan To NPF Must Be Treated As Two Distinct Transactions.

As set forth above, the Signet Loan to NPF (and the pledge of security in support of that loan) cannot be a contribution for the purposes of FECA because NPF was neither a candidate nor a political committee, and NPF's $1.6 million payment cannot be a contribution for the purposes of FECA because it was a loan repayment and RNSEC was a non-federal, soft money account. In addition, the recommendation of the General Counsel is contrary to these established precedents to the extent, if any, that it is based on the theory that two distinct transactions, the Signet Loan to NPF and the NPF loan repayment to RNSEC, should be collapsed and considered to be a Signet Loan to RNSEC.

1. It Would Be Contrary To Commission Precedent For The Commission To Approve The General Counsel's Recommendation Based On The Theory That Two Distinct Transactions Should Be Collapsed And Treated As One Transaction.

In recent years, the Commission has repeatedly taken the position that under FECA otherwise lawful transactions should not be collapsed in order to construct an unlawful transaction. See e.g., In re Richard W. Fisher, MUR 4000; In re Sherman for Congress, MUR 4314. In Fisher, the Commission refused to authorized an enforcement action based on a theory that a set of contributions to different campaign committees should be combined with various loan repayments to construct a contribution to one campaign committee that would be in excess of the $1,000 ceiling imposed by §441a(f). Fisher involved an invitation to a dinner with Richard Fisher, a candidate for the U.S. Senate in 1994. The invitation stated, "We are asking each couple attending the dinner to give or raise $5,000 for Richard's campaign." Fisher at 3. FECA prohibited a person from making

contributions "to any candidate or his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000" and prohibited candidates and political committees from knowingly accepting a contribution in violation of this limitation. 2 U.S.C. §§441a(a)(1)(A), 441a(f). In order to avoid the effect of the $1,000 limit, the invitation specified that each couple could contribute $2,000 ($1,000 for each spouse) to Fisher's 1994 campaign committee and each of three political committees which owed money to Fisher in connection with prior campaigns, for a total of $4,000 per spouse. Fisher at 4. The invitation specified, "Fisher will match all debt retirement contributions with new personal contributions to" his 1994 campaign committee. Id. The complainant argued that Fisher and his committee violated the $1,000 limit by accepting contributions from individuals who "laundered" or "earmarked" donations for past campaign debts through Fisher's promise to match all debt retirement contributions with new personal contributions to his general election campaign. Id. at 5.

Despite the fact that the purpose and effect of the contributions to the other three political committees was to benefit the 1994 committee, the FEC General counsel recommended, and the Commission unanimously ruled, that otherwise lawful transactions should not be collapsed in order to find an unlawful transaction. In support of his recommendation, the FEC General Counsel emphasized that "each of these types of contributions is permitted individually under the Act, and they are not prohibited collectively." Id. at 13. The FEC General Counsel noted that the debt that the prior committees owed to Fisher was legitimate and that Fisher was permitted to contribute an unlimited amount of money to his own campaign. Id. "Consequently, tying these two legal acts together – legal contributions for debt retirement and legal contributions made by a candidate – does not make either the contributions or the nexus illegal." Id. Thus, the FEC General Counsel and the Commission both concluded that even if the purpose and effect of a payment is to benefit a political

committee, the payment will not be treated as a contribution to that political committee if it was made to another entity.

In Sherman, the General Counsel and the Commission again held that the objective reality is controlling. Sherman involved a candidate for federal office who lent his federal committee $275,000. The $275,000 had just been repaid to Sherman for a debt owed to Sherman by his state election committee, which contained funds which could not legally be transferred to his federal campaign. Sherman at 2. In essence, the complainant argued that Sherman "may have 'laundered' state campaign contributions by using himself as an intermediary between his state and federal committees" and that the donations to the state committee were, in substance, prohibited contributions to the federal political committee. Id. at 3.

The FEC again focused on the objective reality and refused to collapse a set of lawful transactions in order to find an unlawful transaction. The FEC General Counsel recommended, and the Commission unanimously ruled, that as a matter of law these facts did not constitute a violation of the prohibitions applicable to contributions to federal election committees. Id. at 11, Certification. The General Counsel and the Commission reached this conclusion even though "[t]he repayment appears accelerated or made specifically for the candidate to use these funds for his federal campaign." Id. at 7. The General Counsel stated that "[a]lthough [the acceleration of the loan repayment] may give the appearance of wrongful conduct, this appears not to be a violation of the federal election laws." Id. In reaching this conclusion, the General Counsel focused on the objective reality that the debt owed by the state committee to Sherman was a bona fide loan and that the "funds being paid to Mr. Sherman represented funds to which he was legally entitled." Id. at 9. The General Counsel therefore refused to consider the arguments that, in substance, the state committee and the candidate were made conduits and that unions (or other persons covered by 2

U.S.C. §441b) had, in substance, made prohibited contributions (through the state committee and the candidate) to the federal committee.

NPF was an issues-oriented think tank engaged in the very "discussion of issues" that the Supreme Court held to be constitutionally protected in Buckley v. Valeo, 424 U.S. 1, 42, 96 S.Ct. 612, 646 (1976). The General Counsel has not asserted, let alone made a showing, that NPF was a political committee within the meaning of FECA. The NPF did not make or receive contributions within the meaning of 2 U.S.C. §431(8) and did not make expenditures within the meaning of 2 U.S.C. §431(9). Thus, even apart from the fact that the $1,600,000 loan repayment was paid to a soft money account, under the objective reality test forth in Orloski, Fisher, and Sherman, the facts that the Signet Loan was made to NPF and that the $1,600,000 payment was a loan repayment preclude any finding that the loan was a contribution to the RNC.[16]

Each of the transactions described by the General Counsel is permitted individually. It was permissible for YBD-USA to use foreign funds to purchase certificates of deposit and pledge those certificates as security for a Signet Bank loan to an entity that was not a political committee or candidate (i.e., NPF). It was permitted for NPF to repay the pre-existing bona fide loans from RNSEC. To paraphrase the analysis of the General Counsel in Fisher, "Consequently, tying these two legal acts together -- the pledge of collateral security for the Signet Loan to NPF and the repayment by NPF of the bona fide loans previously extended by RNSEC – does not make either the pledge or the nexus illegal."[17]

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16 For the same reasons as the loan was not a contribution, the pledge of the certificates of deposit as collateral for the Signet Loan to NPF cannot be deemed to be a contribution because neither Signet Bank nor NPF was a political committee or candidate.

17 To be sure, the present matter is readily distinguishable from Fisher. As set forth in III.C. above, Ambrous Young and YBD-Hong Kong could legally have made a donation directly to RNSEC. By contrast, Fisher's 1994 campaign committee could not legally have received four $1,000 contributions from a single individual.

2. It Would Be Contrary To The Teaching Of Buckley For The FEC To Accept The General Counsel's Recommendation Based On A Theory That Two Distinct Transactions Should Be Collapsed And Treated As If They Were One Transaction.

Because FECA is a criminal statute that regulates core First Amendment activity, courts have emphasized the need for clear, bright lines when interpreting FECA. See e.g., Buckley, 424 U.S. at 42-43 (quoting Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315 (1945) (warning of the dangers of adopting vague standards that will blanket first amendment activity with uncertainty)). Accordingly, the Supreme Court held in Buckley that despite the vague language in §608(e)(1) ("relative to"), the provision must be construed as a clear, bright line test, applying to expenditures "that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44, 96 S.Ct. 646-47. As the U.S. Court of Appeals for the D.C. Circuit has held, the Supreme Court's concerns regarding broad constructions of FECA are fully applicable to contributions, as well as to expenditures. Akins v. FEC, 66 F.3d 348, 354 (D.C. Cir. 1995) (the Supreme Court's "rationale concerning the constitutional implications of a broad application of the Act to expenditures applies equally to the Act's reach over contributions."), *vacated on other grounds*, 74 F.3d 287 (D.C. Cir. 1996), *cert. granted*, 6 U.S.L.W. 3825 (June 16, 1997).

The General Counsel's recommendation conflicts with this teaching of Buckley. Any theory that the Signet Loan to NPF and the NPF loan repayment to RNSEC should be treated as a Signet Loan to RNSEC necessarily relies on a vague and shifting subjective theory that will "blanket [ ] [first amendment activity] with uncertainty." Buckley, 424 U.S. at 43, 96 S.Ct. at 646 (quoting Thomas, 323 U.S. at 535, 65 S.Ct. at 32). Any theory under which the intent of an individual could convert a donation to a public policy think tank into a contribution to a political candidate would similarly violate the teaching of Buckley. There will be many instances when a gift to a public policy think tank is arguably intended to benefit one party or another in elections, if

only by generating arguments that support that party's positions. An interpretation of FECA under which liability turns on the intentions of such individuals would necessarily call for judgments similar to those that the Supreme Court rejected in Buckley.

As a result of the uncertainty that would necessarily arise from the lack of clear, unambiguous standards, the FEC has wisely interpreted FECA as focusing on the objective facts, rather than a vague and shifting subjective theory. The FEC should not disregard precedents such as Orloski, Fisher, and Sherman in order to adopt an interpretation of FECA that would raise such serious constitutional issues. The Commission should not now depart from that prior practice. See DeBartolo Corp. v. Florida Gulf Coast Building & Construction, 485 U.S. 568, 575-78, 108 S.Ct. 1392, 1397-99 (1988) (holding that statutory interpretation by the agency entrusted with administering the statute is not entitled to deference where agency's interpretation would raise serious constitutional issues); Akins, 66 F.3d at (courts should avoid adopting an interpretation of FECA that would raise serious constitutional doubt).

* * *

In sum, the RNC did not violate §441e by accepting the NPF loan repayment. The $1,600,00 payment was not a contribution because it was paid to a soft money account. In addition, the $1,600,000 payment was not a contribution because it was a repayment to RNSEC of a bona fide loan from RNSEC. The receipt of the loan repayment also was not a violation of §441e because it was not made by foreign national. Moreover, the Signet Loan to NPF was not a contribution because NPF was not a candidate or political committee. Accordingly, the Commission should reject the recommendation of the General Counsel that there is probable cause to believe that the RNC violated §441e by accepting the $1,600,000 loan repayment from NPF.

IV. THE RNC'S ACTIONS IN THIS MATTER WERE NOT KNOWING AND WILLFUL.

As set forth above, as a matter of law, based on objective facts not in dispute, the RNC did not violate §441e. Thus, the Commission should decline to approve the Commission's recommendation. General Counsel's Brief at 5. Moreover, even if the Commission somehow concluded that the actions of the RNC did somehow constitute a violation of §441e, the Commission should decline to accept the General Counsel's recommendation that there is probable cause to find that the violation was knowing and willful. As the General Counsel concedes, "The knowing and willful standard requires knowledge that one is violating the law." General Counsel's Brief at 5. The General Counsel has not offered any direct evidence that the RNC "knew" that the NPF loan repayment violated §441e. Accordingly, a finding that the RNC knew that the loan repayment violated §441e would be appropriate only if the Commission somehow found that, despite the legal arguments set forth above, the relevant law was so clear that the RNC must have "known" that its actions were unlawful.

The General Counsel has not made any showing that the RNC knew that §441e could be triggered by a bona fide loan repayment by a non-profit corporation not subject to the Act or the Commission's regulations. Further, the General Counsel has not made any showing that the RNC knew that even if such a repayment could be viewed as a donation, such a donation could violate §441e. On the contrary, the General Counsel has shown that NPF retained Mark Braden, an attorney at the national law firm of Baker & Hostetler, who opined in writing that because RNSEC was not a political committee within the meaning of FECA, the transaction complied with FECA and the Commission's regulations. This opinion is particularly significant because, as the General Counsel concedes, the evidence strongly indicates that Mr. Braden knew the foreign source of the money. General Counsel's Brief at 21 n. 19. Given the presence of this legal opinion, there is

absolutely no basis for asserting that the RNC knew that the transaction violated §441e. The General Counsel merely asserts that the opinion was "erroneous[ ]." Regardless of whether Mr. Braden's opinion letter is in error – and as set forth above, there are powerful arguments to be made in support of the opinion – the legal position adopted in the opinion letter is sufficiently reasonable that the parties to the transaction, as well as other organizations such as the RNC, could reasonably rely on it. Indeed, the reasoning of the Baker & Hostetler legal opinion was subsequently adopted by the only court to address the issue.[18] In short, even if the legal opinion provided by Baker & Hostetler stood alone, it would preclude any finding that there is probable cause to believe that the RNC acted knowingly and willfully.

Importantly, however, the Baker & Hostetler opinion letter does not stand alone. The recommendation of the General Counsel relies on a number of unprecedented extensions of the law. As set forth in Part III of this Brief, there are powerful arguments that these proposed extensions are, in fact, contrary to law. In order for the General Counsel to establish that the RNC knew that the receipt of the loan repayment violated §441e, the General Counsel must demonstrate that not only are his proposed extensions of the law appropriate, but that his position is so clear and obvious that the RNC must have "known" in 1996 that his position was correct. The General Counsel simply has not come close to meeting this burden.

The General Counsel has made no showing that the RNC knew that the repayment of a bona fide loan would constitute a contribution within the meaning of FECA even though the FEC

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[18] The General Counsel might argue in response that the RNC must have known that the FEC had applied §441e to elections for state and federal office. However, even if certain attorneys at the RNC were aware of the FEC's prior application of §441e, the General Counsel has failed both (1) to show that those attorneys knew the foreign source of the funds used to purchase the certificates of deposit pledged as collateral in support of the Signet Loan and (2) to show that those attorneys knew (a) that a repayment by NPF of the bona fide, pre-existing loans could be a contribution and (b) that a foreign entity would be considered to have made the repayment if it supplied the funds which were used to purchase the collateral that was pledged as security in support of the bank loan from which the debtor funded the loan repayment.

regulations specify that the repayment to a federal committee of a bona fide loan at a commercially reasonable interest rate would not be considered a contribution by the debtor. The General Counsel has made no showing that the RNC knew that a foreign national would be deemed to have made the loan repayment even though the loan repayment was made by NPF, and NPF was not a foreign national.

There is no merit to the General Counsel's argument that the RNC's alleged decision to receive the loan repayment on October 20, 1996 instead of October 14 or 15, 1996 attests further to knowledge by the RNC that the NPF loan repayment was unlawful. General Counsel's Brief at 36 (citing U.S. v. Hopkins, 916 F.2d 207, 214-15 (5th Cir. 1990) (quoting Ingram v. United States, 360 U.S. 672, 679, 79 S.Ct. 1314, 132 (1959) (holding that efforts at concealment may evidence knowledge of a tax obligation only where the efforts "would be reasonably explainable only in terms of motivation to evade taxation")). First, the General Counsel has not shown an elaborate scheme to disguise the RNC's actions. RNSEC's post-election report disclosed the receipt by RNSEC of $1,600,000 from NPF. Thus, the fact that the loan repayment was made on October 20, 1996 instead of October 14, 15, 18 or 19 simply resulted in the reporting of the loan repayment on December 8, 1996, instead of October 27, 1996. Like the pre-election report, the post election report is available to the staff of the FEC, the press, and the public. In contrast, Hopkins involved "reimbursements through false cash advances or travel vouchers." Moreover, in Hopkins, the evidence of efforts to conceal were joined by direct evidence that the defendants before engaging in the unlawful conduct the defendants had received written materials describing such conduct as unlawful. Hopkins, 916 F.2d at 213-14.

Second, all of the events described by the General Counsel can readily be explained without reference to the purported illegality of the loan repayment. The decision to receive the $1,600,000

loan repayment on October 20, 1996 could be explained by a perception that the pre-election fund raising efforts of RNSEC might be impaired if it were known that RNSEC already had an additional $1,600,000. Similarly, the alleged decision of Haley Barbour to decline the offer of Ambrous Young to make a contribution directly to the RNC can be fully explained both by the fact that as Chairman of NPF, Haley Barbour presumably wanted NPF to be able to pay down its loans from RNSEC and to obtain $500,000 that would enable it to fund its operations until NPF's fundraising picked up after the election, and by the fact that Mr. Young's expressed preference was contingent on "NPF's existing requirement [being] obtain from other channels," Letter addressed to Haley Barbour from Ambrous Young dated September 9, 1994. Moreover, to the extent, if any, that Mr. Barbour knew or suspected that Mr. Young was no longer a U.S. citizen, Mr. Barbour's alleged decision can also be explained by the fact that while it was against the policy of RNSEC to accept donations from foreign nationals, NPF did not have a policy against accepting money from foreign nationals.

The General Counsel's Brief implies that the RNC must have known that foreign donations to NPF violated FECA because Michael Baroody, the first president of NPF, allegedly expressed reservations regarding NPF's seeking to raise funds from foreign sources. General Counsel's Brief at 7. In fact, Mr. Baroody's reservations were based on a belief that because of the NPF's mission of providing a forum for the development of public policy, it was inappropriate for NPF to seek foreign funds. Baroody Deposition at 28-9. Mr. Baroody, like Mr. Barbour and the other individuals associated with NPF, believed that it was lawful for NPF to solicit and accept gifts from foreign sources. Id. Thus, taken in context, Mr. Baroody's deposition suggests that even if Mr. Barbour had known that the source of the funds were foreign, and there is strong evidence that he

did not, Mr. Barbour would reasonably have believed that it was perfectly lawful for the NPF to solicit the YBD-USA pledge of collateral and to accept the proceeds of the Signet Loan.

In short, even if the Commission somehow determines that there is probable cause to believe that the RNC violated §441e by accepting the loan repayment from NPF, there is no basis for determining that the RNC knew that the acceptance by RNSEC of the NPF loan repayment was unlawful.

V. CONCLUSION.

The General Counsel has not made a showing that the RNC violated §441e by accepting the $1,600,000 loan repayment from NPF, let alone that the purported violation was knowing and willful. Accordingly, the Commission should decline to approve the recommendation of the General Counsel, should find that there is no probable cause to believe that the RNC violated §441e, and should close the file.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 98-0029 (PLF)
YAH LIN "CHARLIE" TRIE, and YUAN PEI "ANTONIO" PAN,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT YAH LIN TRIE'S MOTION TO DISMISS COUNT 1 FOR FAILURE TO STATE AN OFFENSE UNDER 18 U.S.C. § 371 AND VIOLATION OF DUE PROCESS
(Trie Pretrial Motion No. 1A)

Count 1 of the indictment charges that the Defendants conspired to impede the lawful functioning of the Federal Election Commission (referred to below as the "FEC" or the "Commission") in violation of 18 U.S.C. § 371 (1994).[1] See Indictment at 6, ¶ 14.b. Strikingly, however, the indictment nowhere alleges directly that any Defendant actually violated any provision of the FEC's authorizing legislation, the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 to 455 (1994).[2] Nor does the indictment allege that the Defendants conspired to commit an offense by violating any specific section of the FECA.

[1] Count 1 is not numbered as such in the indictment itself. Based on statements in Count 2, Count 1 appears to start at Paragraph 14 on page 6 of the Indictment.

[2] In contrast, the indictment does charge a conspiracy to violate the fraud provisions of 18 U.S.C. §§ 1341 and 1343 (1994). See ¶ 14.a. The "fraud" prong of the alleged conspiracy is not at issue in the current motion.

The reason for this failure is not clear on the face of the indictment itself.[3] What is clear is that the indictment must be dismissed because it fatally misconstrues the requirements of the FECA as applicable to non-federal political contributions, commonly referred to as "soft money," and fails to adequately apprise the Defendant of the basis for the charges against him. In essence, the Indictment alleges that by making a series of indisputably "soft money" contributions that were not prohibited by the FECA, Mr. Trie thereby "impeded" the functions of the FEC in violation of § 371. The current charge must be dismissed because such legal "soft money" contributions could not have defrauded the United States by impeding the functions of the FEC. Moreover, application of § 371 to the defendant's conduct under these circumstances violates the Due Process clause of the Fifth Amendment because Mr. Trie could not have had fair warning that his conduct was proscribed by § 371.

BACKGROUND

The indictment alleges a series of approximately 20 contributions -- characterized as "overt acts" -- allegedly made by or on behalf of Mr. Trie during the period May 14, 1994, to August 1996.[4] See Indictment at 8-17, ¶¶ 3 to 52. According to the Indictment, the contributions at issue total approximately $309,000. Approximately $215,000 of the specified

[3] The reason may relate to the fact that violation of the FECA is at most a misdemeanor offense. See 2 U.S.C. § 437g (1994). Similarly, a conspiracy to violate a misdemeanor statute under the first prong of § 371 is also a misdemeanor. See 18 U.S.C. § 371 (final paragraph). Alternatively, the reason may be that the FECA has a three-year statute of limitation, so that many of the overt acts alleged in the current conspiracy -- including over half of the dollar-value of the contributions allegedly at issue in this case -- fall outside the statute. See 2 U.S.C. § 455.

[4] These allegations are accepted at face value for purposes of this motion only.

contributions allegedly were made by Mr. Trie or his wife using personal checks, or by corporations allegedly associated with Mr. Trie. The remaining $94,000 in contributions allegedly were made using checks written by unnamed co-conspirators.[5] Based on discovery provided by the government to date, a minimum of $165,000 of the contributions at issue -- or more than 50% of the dollar amount of the contributions at issue -- on their face were designated for a "non-federal" account of the Democratic National Committee ("DNC"), or were from corporations and thus automatically should have been classified as non-federal contributions by the recipient political party. The Indictment appears to allege that the contributions specified as overt acts improperly impeded the lawful functions of the FEC because they either (1) were made on behalf of a foreign national, contrary to 2 U.S.C. § 441e, or (2) were made by one person in the name of another person, contrary to 2 U.S.C. § 441f. See Indictment at 3, ¶¶ 6, 7.

ARGUMENT

I. THE REGULATION OF "SOFT MONEY"

A. Contributions to Federal Campaigns

True to its title (the "Federal Election Campaign Act"), the FECA establishes fixed limits on contributions to federal campaigns. The key term in the Act -- "contribution" -- is defined as follows:

[5] The government to date has refused to identify the unnamed other contributors whom the indictment typically characterizes as co-conspirators. The government's failure to provide this information is the subject of Trie Pretrial Motion No. 8 seeking a bill of particulars.

> any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.

2 U.S.C. § 431(8)(A)(i) (emphasis added). "Federal office" in turn is defined to include the offices of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress. Id. § 431(3). Similarly, the term "candidate" under the Act is limited to individuals who seek nomination or election to federal office. Id. § 431(2).[6]

Using these defined terms as building blocks, the Act mandates maximum limits on contributions to federal campaigns from various sources. For example, with respect to federal campaigns an individual may contribute no more than:

- $1,000 to a particular candidate in connection with a particular campaign;[7]
- labor unions are prohibited from contributing to federal campaigns under the same subsection; and
- persons are not permitted to contribute to federal campaigns "in the name of another person" under § 441f.

B. Contributions to "Non-Federal" Campaigns

The limitations on contributions to "federal" campaigns cited in the preceding section do not apply to "non-federal" contributions. As a result, major political organizations,

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[6] FEC regulations similarly define terms such as "election," "candidate," and "contribution" almost exclusively in terms of federal campaigns. See 11 C.F.R. § 100.2-8 (1997). The regulations at issue are exceedingly complex. The applicable FEC definition of "contribution" by itself occupies seven pages of the Code of Federal Regulations. See 11 C.F.R. § 100.7 (1997).

[7] See 2 U.S.C. § 441a(a)(1)(A). Federal primaries and general elections count separately in determining compliance with this limit.

including the DNC, have created separate "federal" and "non-federal" bank accounts to manage these different types of contributions. See 11 C.F.R. § 102.5(a)(1) (1997). Contributions to the federal account, which may be used in connection with federal elections, are typically referred to as "hard" money. Contributions to the non-federal account, which may only be used in connection with state or local elections (or for certain other limited purposes) are typically referred to as "soft" money.[8]

Drastically different legal restrictions apply to "hard" and "soft" money. For example, the FECA makes it "unlawful" for a corporation to contribute to federal elections. See 2 U.S.C. § 441b(a). Nevertheless, the FEC reports that the DNC's accepted over $58 million in its "Non-federal Corporate" account during in the 1995-96 election cycle.[9] Similarly, even though the FECA makes it unlawful for an individual to contribute more than $1,000 to any particular federal candidate (or more than $20,000 to a national political party for federal campaigns generally), FEC databases show that hundreds of individuals contributed $50,000 or more to Democratic and Republican party organizations during 1995-96.[10] Finally, even though it is unlawful for labor unions and corporations to contribute to federal campaigns,[11] such

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[8] The FEC has published the following definition:

> **soft money** -- n. [slang]: funds raised and/or spent outside the limitations and prohibitions of the Federal Election Commission Act. Sometimes referred to as nonfederal funds, soft money often includes corporate and/or labor treasury funds, and individual contributions in excess of the federal limits. . . .

See FEC, Twenty Year Report at 19 (emphasis added) (Attach. A).

[9] Federal Election Commission Press Release, March 19, 1997, at 7. (Attach. B).

[10] Sample records from the FEC database are provided at Attach. C.

[11] See 2 U.S.C. § 441b(a).

organizations can and do legally make contributions to state and local candidates in dozens of states.[12] Overall, the national committees of the Democratic and Republican parties received over $260 million in "soft" money in the 1996 election cycle. See FEC Press Release, March 19, 1997, at 2 (Attach. B).

The FEC itself has openly stated that legal restrictions on federal contributions do not apply to "soft" money:

> Only funds deposited into the federal bank account are subject to the limitations, prohibitions and disclosure requirements of the FECA. The nonfederal or "soft money" account is subject only to state laws, which may be more permissive than the FECA.

FEC, Twenty Year Report at 19 (emphasis added) (Attach. A).

The Indictment here, however, on its face fails to distinguish between the different legal standards applicable to federal and non-federal contributions. As a result, it is defective for at least two reasons. First, as set forth below in detail, Mr. Trie cannot determine from the Indictment as drafted whether he is charged in Count 1 with (1) impeding the FEC by knowingly and willfully making non-federal contributions; (2) impeding the FEC by knowingly and willfully making federal contributions; or (3) some combination of (1) and (2).

Because the current Indictment on its face fails to distinguish between scenarios (1) and (2), it appears that the Grand Jury was instructed that it could, and in fact it did, indict Mr. Trie without finding probable cause that any federal contributions of the type actually

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[12] Thirty states allow corporate contributions. Forty-one states allow union treasury money to be used in political campaigns. See Congressional Research Service, Soft and Hard Money in Contemporary Elections: What Federal Law Does and Does Not Regulate at 3 (Jan. 10, 1997) (Attach. D).

covered by the FECA were made.[13] If this in fact occurred, the Indictment effectively deprives Mr. Trie of his right to be tried only "on a presentment or indictment of a Grand Jury." U.S. Const. amend. V; see also United States v. Keith, 605 F.2d 462, 464 (9th Cir. 1979) ("[A defendant] cannot be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury."). The failure to allege critical elements is itself a basis for dismissing an indictment. See Russell v. United States, 369 U.S. 749, 764 (1962); United States v. Nance, 533 F.2d 699, 701 (D.C. Cir. 1976).

Second, to the extent that the current indictment in fact depends on a theory that the FECA applies to non-federal contributions, it relies on plainly mistaken legal standard and must be dismissed, for the reasons set forth below.

C. The FECA Does Not Apply To The Soft-Money Contributions Allegedly At Issue

The Indictment appears to charge that contributions associated with Mr. Trie "impeded" the FEC's performance of its functions by (1) having been made "in the name of another," in alleged contravention of § 441f; and (2) having been made by a foreign national in alleged contravention of § 441e. See Indictment at 3, ¶¶ 6, 7. In fact, the "soft money" contributions specified in the indictment could not as a matter of law have violated either provision, as set forth below.

[13] Trie Pretrial Motion 1B addresses the apparent failure here to instruct the Grand Jury properly and the remedies available where such a failure occurs.

1. **The Contributions Specified In The Indictment Consist In Whole Or In Part Of "Soft" Money**

Based on allegations in the Indictment and limited discovery provided by the government to date, at least $165,000 of the contributions at issue on their face should have been deposited to the DNC's non-federal account. These contributions include $85,000 in checks paid by checks drawn from corporate accounts (as indicated on the face of the checks themselves),[14] and two checks -- in the amounts of $60,000 and $20,000 -- drawn on Mr. Trie's personal checking account in 1994, one of which has "NON-FEDERAL" written on its face, and the other of which says "NONE [sic] FED." See Attach. E.

Under applicable FEC regulations, the DNC should not have deposited any of these contributions to its federal account. Contributions made by corporate check can only be deposited to a non-federal account, consistent with the prohibition in § 441b(a) against corporate contributions to federal elections. See also 11 C.F.R. § 103.3 (1997) (governing deposits of receipts by political committees). Similarly, contributions designated for a "non-federal" account cannot legally be deposited in a political committee's federal account. See 11 C.F.R. § 102.5(a)(2) (1997).

Based on the Indictment, which lumps federal and non-federal contributions together without distinction as "overt acts," it does not appear that the Grand Jury either considered or was instructed regarding the different treatment of "soft" and "hard" money under the FECA. Moreover, there is no way to determine from the Indictment as drafted whether the Grand Jury even attempted to determine whether any of the remaining $144,000 in contributions

[14] See Indictment at 8, ¶ 3; 9, ¶ 8; 11, ¶ 21.

(i.e., contributions in excess of the $165,000 discussed above) should have been classified as "soft" or "hard" money.

2. Non-Federal Contributions "In The Name Of Another" Are Not Covered By § 441f

It cannot be seriously disputed that the prohibition in § 441f against contributions to federal campaigns by one person "in the name of another" do not apply to "soft" money. Section 441f provides in relevant part:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution . . . .

Id. (emphasis added).

The definitional section of the FECA, however, plainly defines "contribution" as used in § 441f to be limited to "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." See 2 U.S.C. § 431(8) (emphasis added). Section 431 explicitly states that the statutory definitions apply whenever any defined term is "used in this Act," which obviously includes § 441f. See 2 U.S.C. § 431 (first line). Consequently, because § 441f is aimed at "contributions" by persons "in the name of another," and because the term "contribution" is plainly limited to contributions to federal campaigns, § 441f by its own terms prohibits only contributions of hard money.

The clearest indication that this result applies here is the FEC's own "legal analysis" of its pending administrative inquiry into contributions by Mr. Trie. There, the FEC stated:

> Section 441f is limited to elections for federal office, based on the definition of "contribution" at Section 431(8) and the lack of any contravening language within Section 441f.

See FEC MUR: 4530, Factual and Legal Analysis at 3-4 (emphasis added) (Attach. F).

Accordingly, the contributions alleged to be at issue, even if proven to have been made in violation of § 441f, could not serve as the basis for "impeding" the FEC on this ground, since the FEC itself has admitted that this section does not apply to non-federal contributions.

3. Non-Federal Contributions by Foreign Nationals Are Not Covered by § 441e

Similarly, the FECA's prohibition against contributions by foreign nationals does not apply to soft money. Section 441e states:

> It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office; or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from a foreign national.

Id. (emphasis added).

As with § 441f, the prohibited act alleged to be at issue -- the making of a "contribution" -- is defined at § 431(8) of the Act.[15] As noted above, § 431 explicitly states that the statutory definitions apply whenever any defined term is "used in this Act," which includes § 441e. See 2 U.S.C. § 431 (first line). Consequently, because § 441e is aimed at

[15] As noted above, § 431(8)(A)(i) defines "contribution" to be: "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i) (emphasis added).

"contributions" by foreign nationals, and because the term "contribution" is plainly limited to contributions to federal campaigns, § 441e by its own terms prohibits only contributions of hard money.[16]

This view is supported by public statements by the Department of Justice itself. For example, Craig Donsanto, the Director of the Election Crimes Branch of the Department's Public Integrity Section, has been widely quoted as stating:

> the hallmark of 'soft money' is that it falls outside the regulatory web of the FECA -- 441e included.[17]

Thus, the government's most knowledgeable attorney with direct responsibility for enforcement of the FECA apparently takes a position flatly inconsistent with Count 1 of the Indictment which on its face charges that donations of soft money are regulated.

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[16] In addition, § 441e refers to "candidates," which under § 431(2) is limited to candidates for federal office. Similarly, the FEC's implementing regulations narrow the statutory definition of "election" to "the process by which individuals . . . seek nomination for election or election, to Federal office." See 11 C.F.R. § 100.2(a) (emphasis added). Thus, although § 441e refers to "contributions" in connection with an election to "any" political office, there is no logical reason using the Act's and FEC's own definitions to conclude that non-federal contributions (i.e., soft money) are subject to the Act's prohibitions. As set forth below, any attempt to distinguish between what the statute says on its face and how the government interprets it fails to provide persons reading the statute with adequate notice in violation the Fifth Amendment.

[17] See Benjamin Wittes & Timothy Burger, DOJ's Indogate Problem: Foreign Soft Money Gifts to the DNC Have Made Headlines. But Do They Break the Law? Legal Times, Jan. 6, 1997, at 1 (emphasis added) (Attach. G). Mr. Donsanto's statement reportedly was memorialized in a printed version of an electronic mail message that the Department released voluntarily in 1997. The government's refusal to produce this document as part of discovery in this case is subject to Trie Pretrial Motion No. 9 (regarding the government's failure to provide discovery and/or Brady material). Under well-established case law, the statement is at the very least a party-admission by the government under Fed. R. Evid. 801(d)(2). See United States v. Morgan, 581 F.2d 933, 937-38 (D.C. Cir. 1978); United States v. AT & T, 498 F. Supp. 353, 357 (D.D.C. 1979). It is questionable whether the government in a criminal case may properly take positions inconsistent with its own prior analysis absent a valid change in circumstances.

Mr. Donsanto's statement is not an isolated position. For example, in analyzing whether contributions provided in connection with fund-raising calls made by Vice-President Gore from federal offices were covered by federal election law, the Attorney General herself has stated to the same effect:

> the law [18 U.S.C. § 607] specifically applies only to contributions as technically defined by the Federal Election Campaign Act (FECA) – funds commonly referred to as "hard money." The statute originally applied broadly to any political fundraising, but in 1979, over the objection of the Department of Justice, Congress narrowed the scope of section 607 to render it applicable only to FECA contributions. Before concluding that section 607 may have been violated, we must have evidence that a particular solicitation involved a "contribution" within the definition of the FECA.

See Letter from Hon. Janet Reno to Hon. Orin G. Hatch (Apr. 14, 1997) (Attach. H).[18]

Nor is this straight-forward interpretation of the law new. Over twenty years ago, a member of Congress noted that exemptions in the definition of "contribution" under FECA:

> make ambiguous the prohibitions on contributions in the name of another and contributions by unions, corporations and foreign nationals. Since the exemptions apply to these sections . . ., the courts may decide that certain types of donations by unions, corporations and foreign nationals are permissible. . . . [T]hese exemptions . . . may have disastrous effects on election law if the courts interpret them literally.

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[18] Mr. Donsanto's interpretation is similarly supported by the National Republican Senatorial Committee. The Committee's recent comments to the FEC regarding a current rulemaking seeking to increase regulation of soft money forcefully argue, for example, that the FECA currently does not provide the FEC with statutory authority to regulate non-federal contributions, and, in addition, that if construed to allow federal regulation of non-federal (i.e., state and local) elections, that the FECA would be constitutionally deficient under the First and Tenth Amendments. See Letter from Hon. Mitch McConnell to Hon. John Warren McGarry (July 17, 1997) ("The Federal Election Commission did not create 'soft money,' Congress did. The Commission cannot prohibit soft money; that is the sole province of the Congress") (Attach. I). Under Defendant's argument here, this Court need not address the statute's constitutionality since the statute on its face does not reach non-federal contributions.

H.R. Rep. No. 93-1239, 2d Sess., at 141 (views of Rep. Frenzel) (emphasis added) (Attach J).

Congress itself was thus plainly aware of the "literal" meaning of the statute as now drafted, yet Congress nevertheless amended FECA in both 1976 and 1980 to produce the current statute.[19] The particular statutory amendments referred to by Attorney General Reno in her letter to Sen. Hatch were enacted on January 8, 1980, Pub. L. No. 96-187, tit. I, § 101, 93 Stat. 1339. At that time, Congress deleted the definitional provisions (18 U.S.C. § 591) of what was then Chapter 29 of Title 18, and declared that in the future all election law violations should be governed by the definitional provisions of FECA discussed above, 2 U.S.C. § 431. The latter provision, of course, contains the limited definition of "contribution" discussed in the text above and referred to in the Attorney General's letter as justifying a decision not even to investigate -- much less indict or prosecute -- the Vice-President.[20]

4. Applicable Precedent

The principal question facing this court -- whether the prohibition found in § 441e against contributions by foreign nationals applies to non-federal contributions -- appears to be a

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[19] Moreover, as set forth below, it is generally considered to be a court's responsibility to interpret statutes enacted by Congress "literally," particularly in the context of a criminal prosecution.

[20] Congress itself described the 1980 definitional changes as follows:

> Section 202(a)(1) of Chapter 29 has been amended by striking section 591. This is he definitional section relating to, "Elections and Political Activities". It is the intent of the Committee that the definitions of the Federal Election Campaign Act, as amended, be controlling whenever the provisions of Title 18 impact on federal elections and political activity.

H.R. Rep. No. 96-422, 1st Sess., at 25 (Sept. 7, 1979) (emphasis added) reprinted in 1979 U.S.C.C.A.N. 2860, 2885 (Attach. K).

matter of first impression. The Defendant is unaware of any criminal case that has addressed the applicability of § 441e to soft money.[21] The FEC itself has brought administrative actions based on a theory that § 441e applies to both federal and non-federal contributions including most recently, imposition of a civil fine for contributions by a German national who admitted in making over $320,000 in contributions either in his own name or using funds financed by German companies he controlled to various campaigns in Florida.[22] No criminal charges were pursued in that case.[23]

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[21] The Court should be aware that the Department of Justice recently concluded a case involving Representative Jay Kim of California, in which Rep. Kim admitted to receiving over $250,000 in illegal contributions, including numerous contributions by foreign nationals. This case, however, involved contributions to Kim's federal campaign for Congress.

The Kim case also differs from the current case in that the government here has charged Mr. Trie with multiple felonies. In contrast, DOJ and Rep. Kim entered into a plea agreement in August 1997 under which Rep. Kim pleaded guilty to three misdemeanor violations of the FECA. Mr. Kim subsequently was sentenced to two months of home confinement under this agreement and continues to sit in Congress.

[22] See In re Thomas Kramer., MUR 4398 (8/5/96) (Attach. L). In addition, the FEC recently concluded an administrative enforcement action against the Florida law firm in which the Finance Chairman of the DNC is a partner for its role in facilitating contributions by the German national in question.

[23] The fact that the FEC itself contends that § 441e applies to contributions by foreign nationals to non-federal elections is of no significance in determining whether the criminal Indictment at issue in this case is legally sufficient. The Supreme Court has made clear that "a pure question of statutory construction" is not subject to deference to an agency but is instead "for the courts to decide." INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987). This rule is even stronger where a criminal prosecution turns on the question of statutory interpretation at issue. See, e.g., FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954) (holding that where "it is a criminal statute that we must interpret" broad agency interpretation would not be followed where "it would do violence to the well-established principle that penal statutes are to be construed strictly"); United States v. McGoff, 831 F.2d 1071, 1077-83 (D.C. Cir. 1987) ("the law of crimes must be clear. There is less room in a statute's regime for flexibility, a characteristic so familiar to us on this court in the interpretation of statutes entrusted to agencies for administration"). See also Atlanta College of Medical & Dental Careers, Inc., 987 F.2d 821, 828 (D.C. Cir. 1993) (court should consider whether agency's interpretation of a statute is reasonable "[o]nly if [it] find[s] that the statute is silent or ambiguous as to the issue presented").

(Continued ...)

II. COUNT ONE FAILS TO STATE AN OFFENSE UNDER THE "CONSPIRACY TO DEFRAUD" CLAUSE OF 18 U.S.C. § 371

A. The Defendant Could Not Have Impeded The Functions Of The FEC Because "Soft Money" Was Not Prohibited By The FECA

As described above, Mr. Trie is charged with conspiring to defraud the United States by impairing the lawful functions of the FEC, in violation of 18 U.S.C. § 371. Indictment at 6. However, because the "soft money" donations alleged in the Indictment were not proscribed or even regulated by the FECA, Mr. Trie could not have "impaired" the lawful functions of the FEC by allegedly engaging in such conduct. Accordingly, Count 1 should be dismissed for failure to state an offense.

Section 371 criminalizes conspiracies two types of conspiracies: (a) conspiracies to commit an offense against the United States; and (b) conspiracies to defraud the United States.[24] As the Supreme Court has stated, the "defraud" clause of § 371:

> means to interfere with or obstruct one of [the government's] lawful functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official actions and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charges with carrying out the governmental intention.

Where as here a "statute's text forecloses" the agency's interpretation, the court will "accord no deference to [that] interpretation." Id. at 828.

[24] 18 U.S.C. § 371 provides:

> If two or more persons conspire to either commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such person do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years or both.

Id.

Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) (emphasis added). Given the potential far-reaching nature of the "defraud" clause of § 371, and its "stingy" legislative history, the Supreme Court has held that any "ambiguity concerning the ambit" of the defraud clause of the statute "should be resolved in favor of lenity." Tanner v. United States, 483 U.S. 107, 131 (1987) (quotation omitted); see also United States v. Minarik, 875 F.2d 1186, 1191 (6th Cir. 1989) (holding that § 371 should be construed narrowly to prevent "loose interpretations of criminal fraud statutes which allow the fact situation to define the crime.").

"A charge of conspiracy to defraud will not lie where there is no positive obstruction of a government program." Minarik, 875 F.2d at 1191. For instance, in United States v. Porter, 591 F.2d 1048 (5th Cir. 1979), the defendants were charged with defrauding the United States and the Department of Health, Education and Welfare ("HEW") Id. at 1055. Essentially, the government alleged that the defendant doctors referred blood samples to laboratories in return for "handling fees" from the labs. The laboratories, in turn, were able to obtain higher reimbursements from HEW than the doctors could have obtained for performing the work directly. Id. at 1050-53. Although the government contended that the defendants defrauded HEW of its right to have the Medicare program conducted "honestly and fairly," the court held, "the conspiracy count can stand only if the government can point to some lawful function which has been impaired, obstructed or defeated." Id. at 1055. The court reversed the conspiracy conviction because no statute placed the defendants on notice that their conduct was unlawful or could have impeded any function of HEW. Id. at 1057. In so doing, the court noted it was bound to "scrutinize" the indictment closely "because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the guilty." Id.

(citing Dennis v. United States, 384 U.S. 855, 860 (1966)).[25] Just as in Porter, Mr. Trie's actions here violated no applicable statute, and thus could not have impeded the functions of the FEC.

B. Even If Soft Money Was Regulated By The FECA, Count One Fails To State An Offense Under The "Defraud" Clause Of § 371

In this case, even assuming that the alleged "soft money" contributions were prohibited by the FECA, Count 1 should be dismissed because the government may not charge a defendant under the "defraud" clause of § 371 where the underlying conduct alleged is subject to a specific offense defined by Congress. For instance, the court in Minarik reversed a conspiracy conviction under the defraud clause, where the underlying conduct alleged violated a specific provision of the tax code. As the court stated:

> The court should require that any conspiracy prosecution charging that conduct [covered by a specific statute] be brought under the offense clause in order "to achieve the remedial purposes that Congress had identified," if it is clear that Congress has specifically considered a given pattern of wrongful conduct and enacted a specific statute with a specific range of penalties to cover it.

[25] Moreover, even where the defendant's actions could have interfered with a governmental function, which is not the case here, to support a conspiracy to defraud charge under § 371 the government still must allege and prove that the defendant was aware of the underlying governmental function. For instance, in United States v. Collins, 78 F.3d 1021 (4th Cir.), cert. denied, 117 S. Ct. 189 (1998), where the defendant was charged with impeding the ability of the IRS to collect taxes, the court held "it is not sufficient for the government to merely show that Defendant's actions had an incidental effect on the IRS." Id. at 1038. Rather, the government was required to show that the defendant "knew of the liability for federal taxes." Id. In this case, Mr. Trie could not have known that the "soft money" contributions at issue could interfere with any function of the FEC where even high-ranking officials at the Department of Justice have articulated their belief that "soft money" is not prohibited by the FECA. For the reasons stated in section III below, any charge to the contrary violates the Due Process Clause of the Fifth Amendment and should not be tolerated.

Minarik, 875 F.2d at 1193. This conclusion was compelled by the original purpose of the "defraud" language in § 371 which was intended "to reach conduct not covered elsewhere in the criminal code." Id. at 1194. Moreover, as the court made clear:

> [I]f conspiracy agreements the object of which fall under a specific offense defined by Congress are allowed to be prosecuted under the "defraud" clause, the purpose of the misdemeanor provision of § 371 will be defeated. That provision says that when the "offense . . . which is the object of the conspiracy" is a misdemeanor, the punishment under § 371 must be limited to the punishment provided for the misdemeanor. Congressional intent will be defeated if the government can prosecute under the defraud clause conduct which Congress has isolated and defined as a misdemeanor.

Id. (emphasis added).

In addition, the court noted that the technical standards allegedly violated by the defendants and the subject of the "conspiracy to defraud charge" were required to be prosecuted under the "offense" clause to provide the defendants with notice of the nature of the crime:

> [W]here the duties of a citizen are as technical and difficult to discern . . . we hold that a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it into the offense clause. This conspiracy is still an indictable offense under the first clause of § 371. But compliance with our rule today will mean that prosecutors and courts are required to determine and acknowledge exactly what the alleged crime is. They may not allow the facts to define the crime through hindsight after the case is over.

Id. at 1196 (emphasis added).

The reasoning of Minarik applies with compelling force to this case. Here, the underlying conduct charged is conduct which at most could have violated misdemeanor provisions of the FECA. See 2. U.S.C. § 473g. As demonstrated by Trie Pretrial Motion No. 6, Congress intended to regulate and punish improper or illegal campaign contributions under the

specific prohibitions, limitations and penalties of the FECA. Although the authorities cited above demonstrate that "soft money" contributions are not prohibited under the FECA, even assuming they were, the government may not charge Mr. Trie under the broad "defraud" clause of § 371 for conduct that is specifically punishable as a misdemeanor. The only viable conspiracy charge in this case, taking the government's allegations at face value, is a conspiracy to violate § 441e and § 441f of the FECA, which may only be punished as a misdemeanor. The current prosecution is an obvious attempt to side-step this significant limitation and should be rejected. Accordingly, even if the Court concludes that "soft money" contributions were prohibited by the FECA, Count 1 must be dismissed.

III. BECAUSE MR. TRIE HAD NO FAIR WARNING THAT THE DONATION OF SOFT MONEY COULD CONSTITUTE A CONSPIRACY TO DEFRAUD THE FEC, THE DUE PROCESS CLAUSE REQUIRES THE DISMISSAL OF COUNT 1

Count 1 should also be dismissed because any prosecution of Mr. Trie in this case would violate the Due Process Clause of the Fifth Amendment.

The Fifth Amendment, which guarantees due process of law, forbids punishing a criminal defendant for conduct "which he could not reasonably understand to be proscribed." United States v. Harris, 347 U.S. 612, 617 (1954). As the Supreme Court recently articulated, this "fair warning requirement" prohibits application of a criminal statute to a defendant unless it was reasonably clear at the time of the alleged action that the defendant's actions were criminal. United States v. Lanier, 117 S. Ct. 1219, 1225 (1997).

First, "the vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" Id. at 1225 (quoting Connally

v. General Constr. Co., 269 U.S. 385, 391 (1926)). Second, "the canon of strict construction of criminal statutes, or the rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." Id. (citations omitted) (emphasis added).

Under either formulation, applying § 371 to the allegation that Mr. Trie contributed "soft" money or non-federal contributions to the DNC – contributions that were permissible under the FECA, or at least not clearly prohibited – and thereby "impeded" the functions of the FEC, would violate fundamental notions of due process and cannot be allowed.

A. Section 371 Is Impermissibly Vague As Applied To The Current Allegations Of "Soft" Money Contributions To The DNC

It is well-established that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) (quoting Harriss, 347 U.S. at 617). In holding 18 U.S.C. § 1505 unconstitutionally vague, the D.C. Circuit declared that "a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct it prohibits, and do so in a manner that does not invite arbitrary and discriminatory enforcement . . . ." United States v. Poindexter, 951 F.2d 369, 378 (D.C. Cir. 1991), cert. denied 506 U.S. 1021 (1992); see also Ricks v. District of Columbia, 414 F.2d 1097, 1101 (D.C. Cir. 1968) (holding vagrancy law unconstitutionally vague, court stated "a criminal statute perishes on constitutional grounds when it leaves speculative the tests for ascertaining the line separating guilty from innocent acts.").

Similarly, in United States v. Murphy, 809 F.2d 1427, 1431 (9th Cir. 1987), the court held that the defendant could not be convicted of a § 1001 concealment offense where the law did not clearly require disclosure of the allegedly withheld information. Id. at 1430 ("[d]ue process requires that penal statutes define criminal offenses with sufficient clarity that an ordinary person can understand what conduct is prohibited."); see also United States v. Crop Growers Corp., 954 F. Supp. 335, 348 (D.D.C. 1997) (dismissing § 1001 charge where language in forms was "quite simply, too vague and amorphous to give fair notice, required by the Due Process Clause, of what disclosure is required.").[26]

Moreover, it is of no consequence that certain courts have applied § 371 to cases alleging that the contribution of "hard money" in the name of another defrauded the United States by impairing the functions of the FEC. As Poindexter made clear, "[i]t is not possible to extrapolate from a case holding that a particular act is within the scope of the statute in order to determine whether a different act is also covered unless the court provides a coherent principle for inclusion or exclusion." 951 F.2d at 384.

In this case, even high-ranking officials of the Department of Justice are on record as stating that the FECA's ban on contributions by foreign nationals or in the name of another do not apply to "soft money" contributions to non-federal accounts of political parties. If these experts do not believe such conduct is prohibited by the FECA, it is inconceivable that Mr. Trie

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[26] See also United States v. Salisbury, 983 F.2d 1369, 1373 (6th Cir. 1993) (holding voting law unconstitutionally vague -- "Due process is violated where a statute provides no definite standard of conduct, thereby giving law enforcement officers, courts and jurors unfettered freedom to act on nothing but their own preferences and beliefs"); United States v. Tana, 618 F. Supp. 1393, 1396-97 (S.D.N.Y. 1985) (dismissing indictment under 18 U.S.C. § 641 as vague under circumstances of case where there was "no instance during the 110 years since the section's adoption" in which it had been applied as charged).

or other "men of common intelligence" could have reasonably understood that his actions were proscribed by § 371 of the criminal code and could have "impeded" the functions of the FEC. See Lanier, 117 S. Ct. at 1225.

B. The "Rule Of Lenity" Forbids Application Of Section 371 To Allegations Of "Soft Money" Contributions

"[T]he law in this Circuit (as elsewhere) is clear that, where a criminal statute is ambiguous, the rule of lenity dictates that ambiguities be resolved in favor of leniency to the defendant." United States v. Watson, 788 F. Supp. 22, 24 (D.D.C. 1992); see also Crandon v. United States, 494 U.S. 152, 158 (1990); Ratzlaf v. United States, 510 U.S. 135, 149 (1994) (Where a criminal statute is ambiguous, "we would resolve any doubt in favor of the defendant."); Bell v. United States, 349 U.S. 81, 83 (1955). Under this principle, "where the text, structure, and history fail to establish that the Government's position is unambiguously correct," courts must "apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." United States v. Granderson, 511 U.S. 39, 54 (1994).

For all of the reasons discussed above, Mr. Trie could not have conspired to "impede" the FEC's functions by allegedly violating § 441e and § 441f of the FECA because neither of these provisions prohibit the donation of "soft" money to political parties such as the DNC. Both the text of the FECA and its legislative history demonstrate that the FECA's prohibition on contributions by foreign nationals (§ 441e) and in the name of another (§ 441f) does not apply to "soft" money contributions to non-federal accounts of political parties.

In light of the text, structure and history of the FECA, it simply cannot be said that the application of §§ 441e and 441f to "soft" money contributions is "unambiguously

"correct." See Granderson, 511 U.S. at 54. The FEC itself concedes that § 441f prohibits only contributions for the purpose of *influencing elections for federal office, based on the definition* of "contribution" at Section 431(8). See FEC Factual and Legal Analysis, MUR 4530 (Attach. F). The text of § 441e, at a minimum, creates a facial ambiguity as to whether it prohibits contributions in connection with elections to "any political office," or only contributions "for the purpose of influencing any election for Federal office," as provided in its definition section, § 431(8)(A)(i).[27] In light of the foregoing, to the extent the Court finds §§ 441e and 441f ambiguous as applied to "soft" money contributions, it should resolve all doubts in favor of Mr. Trie, and hold these provisions of the FECA inapplicable to "soft" money contributions. To the extent Mr. Trie's conduct was not even prohibited by the FECA, he could not have conspired to "defraud" the FEC or "impede" its functions.

CONCLUSION

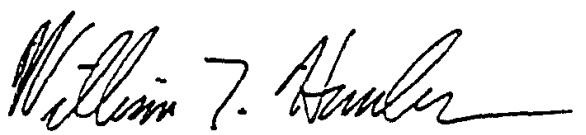
The current Indictment is an unprecedented attempt to prosecute unregulated "soft money" contributions as a felony conspiracy. The text and history of the FECA, however, make

[27] Moreover, even DOJ's foremost expert on election law has stated that "the hallmark of 'soft money' is that it falls outside the regulatory web of the FECA-441e included." See Attach. G.

clear that its prohibitions to not apply to "soft money," including corporate contributions, contributions by foreign nationals or in the name of another, or contributions by individuals in excess of the federal limits to non-federal accounts of political parties. Furthermore, the current indictment fails to distinguish between "soft" and "hard" contributions, despite the fact that over half of the total amount of contributions at issue undeniably constituted "soft money." This fundamental misconception is fatal to Count 1 of the Indictment.

Because the "soft money" contributions at issue were not even prohibited by the FECA, Mr. Trie's conduct could not have "impeded" the functions of the FEC. The Due Process Clause of the Fifth Amendment precludes application of the conspiracy statute to Mr. Trie's conduct because he had no fair warning that the statute could reasonably apply. Accordingly, this Court should dismiss the fatally flawed Count 1 insofar as it relates to the conspiracy to defraud the United States by impeding the functions of the FEC.

Respectfully submitted,



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